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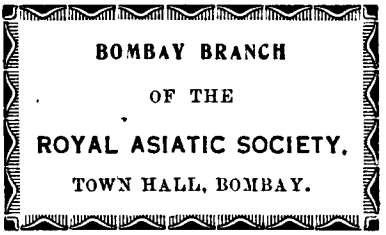

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COMMENTARIES

ON THE

INDIAN LIMITATION ACT

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BY

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ACT No. XV OF 1877.

As amended by Acts No. XII of 1879, *No. VIII of* 1880, *No. V of* 1881, *No. IX of* 1887, *No. VII of* 1888, *No. XII of* 1891, *and No. VI of* 1892.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Act No. XV of* 1877 *received the assent of the Governor-General on the* 19*th of July* 1877).

An Act for the Limitation of Suits, and for other purposes. Title.

[Act XIV of 1859, which provided periods of limitation in the case of *applications* for execution of decrees and orders, as well as periods for the limitation of *suits* in the ordinary acceptation of the word, was entitled "an Act to provide for the limitation of suits." (See Hurro *v.* Shoorodhonee, 9 W. R., 402, F. B.) In Act XV, *suit* does *not* include an appeal or an application. (See sec. 3 and note 9, p. 278, *supra*). The words "and for *other* purposes" refer to the limitation of *appeals* and *applications*, and to the rules relating to *prescription* in secs. 26 to 28. As to the distinction between limitation and prescription, see Lecture I, pp. 1 to 13, *supra*].

WHEREAS it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property: It is hereby enacted as follows:— Preamble.

[Act XIV of 1859 and Act IX of 1871 recited the expediency of amending and *consolidating* the law of limitation. (See Lecture III). The work of consolidation having been effected by those Acts, the main object of Act XV is to *amend* the law of limitation. The rules for acquiring ownership by possession laid down by Act IX of 1871 have been only slightly modified by this Act.

"*Certain* applications to *Courts*."—Not applications to *arbitrators* or heads of *offices*, nor *all* applications to Courts. Applications to *Civil* Courts *if similar* to those which are specified in the third division of Schedule II are governed by this Act. An application for a probate or for a certificate, not being an application under the Civil Procedure Code, is not governed by the Limitation Act. An application under the Civil Procedure Code, which the Court cannot refuse, is also not governed by the Act. (See p. 236, *supra*, and notes to Art. 178). Applications in *Criminal* cases are not provided for. (Queen-Empress *v.* Ajudhia Sing, I. L. R., 10 All., 350, and p. 29, note 9, *supra*). Certain applications.

Rules for the acquisition of an absolute and indefeasible right to easements, by *quasi*-possession or enjoyment, are here described as "rules for acquiring by possession the ownership of easements." (See secs. 26 and 27, and Lectures VI and XII). It may be that the "Possession" includes *quasi*-possession.

term "possession," strictly speaking, is inapplicable to easements or other incorporeal things; but the Indian Legislature has here, and in other instances, used the term as applicable to easements, fisheries, &c., without regard to the incorporeal nature of such hereditaments. (Per Pigot, J., in Fadu *v.* Gourmohun, I. L. R., 19 Cal., 544, 555).

Acquisition of property and of easements.

No *express* rules have been laid down by the Act "for *acquiring* by *possession* the ownership of *other* property." But the Preamble evidently refers to the rule in sec. 28, under which the right to property is *extinguished* by the *absence of possession*, and *virtually* conveyed to the party in possession. The Legislature, here, clearly expresses its views as to the *effect* of the extinguishment of right under sec. 28. (See pp. 3, 4, 13, and 332, *supra*, and Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, at p. 228).

"Easements and other property."—An easement, however, is rather a fringe to property than property itself. (See p. 353, *supra*). In sec. 28, the word "property" is used in its ordinary sense, and does *not* include "easements." [See pp. 325, 347, 363, and 364, *supra*. Under sec. 47 of the Easements Act, V of 1882, easements are extinguished by 20 years' non-enjoyment, and not by 12 years' non-possession].

PART I.

PRELIMINARY.

Sec. 1. Short title.

1. This Act may be called "The Indian Limitation Act, 1877."

Extent of Act.

It extends to the whole of British India; but nothing contained in sections two and three or in Parts II and III applies—

(*a*) to suits under the Indian Divorce Act, or

(*b*) to suits under Madras Regulation VI of 1831;

Commencement.

and it shall come into force on the first day of October 1877.

[Cf. sec. 1, Act IX of 1871.

British India, including scheduled districts.

"Whole of British India."—Compare sec. 1 of Act XIV of 1882, and sec. 24, Act XIV of 1859. Act XV of 1877 applies even to the non-regulation or scheduled districts of British India. The Darjiling and Jalpigori districts, the Hill Tracts of Chittagong, the Santal Pargannas, the Chota Nagpore Division, the Mehal of Angul, are scheduled districts within the Province of Bengal. (See p. 234, *supra*, and notes to "foreign country," sec. 3). Act XV has been *declared* to be in force in the recently conquered Province of Upper Burma. (See sec. 6, Act 20 of 1886).

By 21 and 22 Vict., c. 106, "British India" includes all territories then in the possession or under the Government of the East India Company, and all territories which may become vested in Her Majesty by virtue of any rights vested in, or which might, but for the passing of that Act, have been exercised by the said Company in relation to any territories. The settlement of Prince of Wales' Island, Singapore and Malacca, is, however, *excluded*.

The Limitation Act may be *adopted* by *foreign* States. Act IX of 1871 was adopted by the Cooch Behar State.

"Suits under the Indian Divorce Act."—Such as suits for dissolution of marriage or for judicial separation (with or without a claim for damages against the co-respondent); suits for declaration of nullity of marriage; and suits for restitution of conjugal rights. The Indian Divorce Act (IV of 1869) applies to cases instituted by persons professing the *Christian* religion, and residing in India at the time of commencing proceedings. It also applies to marriages contracted by Brahmos and others under Act III of 1872. Unreasonable delay in presenting or prosecuting a petition for dissolution of marriage is, under the Divorce Act, a ground for disallowing the petition. Act XIV of 1859 also did not apply to suits for divorce. (See p. 193, *supra*). Suits by *Mahomedans* or *Hindus* for a decree for nullity of marriage or for restitution of conjugal rights *are* governed by Act XV of 1877. Suits under Divorce Act.

Madras Regulation VI of 1831 is a Regulation to prevent the misappropriation of emoluments annexed by the State to hereditary village and other offices in the Revenue and Police Departments, and to maintain the due efficiency of those offices. Claims to such offices or to any of the emoluments annexed thereto are cognizable by the *Revenue* authorities subject to the ultimate control of the Government. (See Basappa *v.* Venkatappa, 4 Mad., 70). Mad. Reg. VI.

Commencement of the Act.—The Act applies to all suits *instituted*, appeals *presented*, and applications *made*, on or after the 1st October 1877. For a *temporary* exception as regards *suits* for which *longer* periods of limitation were allowed by Act IX of 1871, see sec. 2, cl. 3, *infra*. That clause is now spent, and has been repealed by Act XII of 1891. For the law applicable to *all proceedings commenced before* the 1st of October 1877, and *pending* on that date, see sec. 6, Act I of 1868, and pp. 203 and 204, *supra*. As to whether the first, second or third application for execution of a decree obtained in a suit which had been *instituted* before the 1st of October 1877, is governed by the old law, or by the law in force at the time when the application is made, see Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bom., 459; Becharam *v.* Abdul, I. L. R., 11 Calc., 55; and pp. 205 and 213, *supra*. Rights to institute suits or make applications which were *barred* on the 1st of October 1877, under the operation of the old law of limitation, are *not* in any case *revived* by this Act. With this exception, the Act applies to transactions which took place before or after the 1st October 1877, and to causes of action which accrued before or after that date. See pp. 208—215, and 234, *supra*]. Commencement of operation of Act. Pending proceedings.

2. *On and from that day, the Acts mentioned in the first schedule hereto annexed shall be repealed to the extent therein specified.* Sec. 2, cl. 1. (Now repealed).

[Cf. sec. 2, Act IX of 1871. On the effect of *repeal* of Acts, see pp. 202, 204, 208, 209, 215, and 242, *supra*. As to the repeal of sec. 599 of Act X of 1877, and as to the repeal or non-repeal of sec. 599 of Act XIV of 1882, and art. 177 of Act XV of 1877, see *In re* Sitaram Kesho, I. L. R., 15 All., 14. Paragraph 1 of sec. 2 has now been repealed. See the General Repealing Act, XII of 1891, in the Appendix. But it should be remembered that the repeal of a repealing Act does not revive the repealed Act. (See p. 202, *supra*)].

But all references to the Indian Limitation Act, 1871, shall be read as if made to this Act: and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed; and nothing Sec. 2, cl. 2. References to Act IX of 1871. Saving of titles already acquired.

Saving of Act IX of 1872, sec. 25.

herein contained shall be deemed to affect the Indian Contract Act, sec. 25.

Title.

["Any *title* acquired."—A *right to sue*, not barred by Act IX of 1871, is not a *title* acquired under that Act. (Thakarya *v.* Sheo, I. L. R., 2 All., 872). Title *to property* indirectly acquired under sec. 29 of Act IX of 1871 or under Act XIV of 1859, is "title acquired." (See Zulfikar *v.* Manna, I. L. R., 3 All., 148).

Right to sue.

"Any right to *sue* barred."—A right to institute a suit, or to *apply* for execution of a decree is a right to *sue*. "Suit" is defined by sec. 3. But "right to sue" is nowhere defined. "Right to sue" includes the right to make an application invoking the aid of the Court for the purpose of satisfying a demand. (Nursing *v.* Harihar, I. L. R., 5 Calc., 897). A right to sue, which accrued when Act IX of 1871 was in force, but which was *not barred* on the 1st October 1877, is governed by the provisions of Act XV of 1877. See pp. 210, 214, and 215, *supra*. Cl. 2, sec. 184, Act VIII of 1885, lays down a similar rule as to suits, applications, *and appeals* under that Act.

Applications for execution.

Applications for execution of decrees in suits instituted *before* the 1st April 1873, when they are applications in a proceeding commenced before the 1st October 1877, and *pending* on that date, are governed by Act XIV of 1859. (Mungul Pershad *v.* Grijakant, I. L. R., 8 Calc., 51, P. C.) Applications for execution of decrees in suits instituted *on* or *after* the 1st April 1873, and before the 1st of October 1877, when such applications are made in a proceeding *pending* on the 1st October 1877, are governed by Act IX of 1871. *New* applications made on or after 1st October 1877, although the suits from which such applications arise may have been previously instituted, are governed by Act XV of 1877. (See Gurupadapa *v.* Virbhadrapa, I. L. R., 7 Bom., 459; Juggomohun *v.* Luchmessur, I. L. R., 10 Calc., 748; Becharam *v.* Abdul, I. L. R., 11 Calc., 55; Debnarain *v.* Narendra, I. L. R., 16 Calc., 267, F. B.; Venkatrav *v.* Bijesing, I. L. R., 10 Bom., 108; Pasupati *v.* Pasupati, I. L. R., 1 Mad., 52). But cf. Hurrosundari *v.* Bhojohari, I. L. R., 13 Calc., 86, and consider the effect of the recent Legislative declaration that applications for execution of decrees are applications in *suits*. (See sec. 4, Act VI of 1892). (See pp. 204 and 213, *supra*).

Titles fully acquired, and rights to sue completely barred on the 1st October 1877, are saved from the retrospective operation of Act XV. (See pp. 203, 210, 214, and 234, *supra*).

Sec. 25, Act IX of 1872.

Saving of sec. 25 of the Contract Act.—A written *acknowledgment* of a debt in order to be effectual under sec. 19, must be signed *before* the expiry of the prescribed period of limitation. Notwithstanding this provision, a written *promise* to pay a debt, signed *after* the expiry of such period, is valid under sec. 25, cl. 3, of the Contract Act. (See Roghoji *v.* Abdool, I. L. R., 1 Bom., 590; Chatur *v.* Tulsi, I. L. R., 2 Bom., 230; and pp. 277, 290, *supra*). This is declaratory of the old law on the subject. (Heeralal *v.* Dhunput, I. L. R., 4 Calc., 500)].

Sec. 2, cl. 3. (Now repealed).

Notwithstanding anything herein contained, any suit mentioned in No. 146 *of the second schedule hereto annexed may be brought within five years next after the said first day of October* 1877, *unless where the period prescribed for such suit by the said Indian Limitation Act,* 1871, *shall have expired before the completion of the said five years; and any other suit for which the period of limitation prescribed by this Act is shorter than the*

period of limitation prescribed by the said Indian Limitation Act, 1871, *may be brought within two years next after the said first day of October* 1877, *unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.*

[Act XV was passed on the 19th July 1877, but it did not come into operation for two months and twelve days from that date. In respect of suits mentioned in No. 146 (for which the period of limitation has been reduced by thirty years), the Act came into operation (practically) on the 1st October 1882, and as regards other suits for which the periods of limitation have been reduced, the Act came into operation (practically) on the 1st October 1879. So far as these *exceptional suits* are concerned, the Act did *not* (practically) come into force on the 1st October 1877. (See p. 234, *supra*). The *remainders* of the longer periods allowed by Act IX of 1871 were, in effect, extinguished on the dates the Act *practically* came into force.

Period prescribed.

The expression "the period of limitation prescribed" occurs in sec. 2, sec. 4, and other sections. These words refer to the entries in columns 2 *and* 3 of Sched. II, taken in connection with each other, and *not* to the entry in column 2 only. The words "where the *period* of limitation prescribed is *shorter*" have received a *liberal* interpretation. (Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175). *Any provision* of Act XV which *virtually* operates to *shorten* the period of limitation provided under Act IX, entitles the plaintiff to the benefit of the proviso in cl. 3 of sec. 2. (*Ibid.*) So that, even if the *period* of limitation in a particular case is the *same* under either Act IX of 1871 or Act XV of 1877, if the *starting point* of limitation was *later* under Act IX, "the period of limitation prescribed" by Act XV must be considered *shorter* than that prescribed by Act IX. (Rup *v.* Mohni, I. L. R., 3 All., 415). Thus suits on bonds, promissory notes and bills payable on demand, have, *in effect*, a *shorter* period allowed by the Act of 1877. (See Omirttolall *v.* Howell, 2 C. L. R., 426; Appasami *v.* Aghilanda, I. L. R., 2 Mad., 113; Sabapati *v.* Chedumbara, *ibid.*, 397; and Ichha *v.* Killa, I. L. R., 4 Bom., 87). Suits by persons excluded from joint family property to enforce a right to share therein under Art. 127, also, have (*practically*) a *shorter* period allowed by the Act. (Narain *v.* Lokenath, I. L. R., 7 Calc., 461). In cases of a purchase *not* in good faith from a mortgagee, Act XV of 1877 (Art. 134) practically allows a *shorter* period of limitation than Act IX of 1871 (Art. 134). See Baiva Khan *v.* Bhikesazaba, I. L. R., 9 Bom., 475. Under Act IX the period was 60 years from the date of the *mortgage*. (*Ibid.*)

The paragraph in italics has by lapse of time become unnecessary. It has accordingly been repealed by Act XII of 1891].

Sec. 3. Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context—

[Cf. sec. 3, Act IX of 1871. See pp. 179 and 207, *supra*.

'plaintiff' includes also any person from or through whom a plaintiff derives his right to sue; 'applicant' includes also any person from or through whom an applicant derives his right to apply; and 'defendant' includes also any person from or through whom a defendant derives his liability to be sued:

["Person from or through whom a plaintiff or defendant derives his right to sue, or his liability to be sued." The word "from"

From, through and under.

probably refers to cases of alienation and transfer, and "through" to cases of inheritance and succession. (See Ali Saheb *v.* Kaji Ahmad, I. L. R., 16 Bom., 197, 198). But both the words are often used indiscriminately as applicable to both classes of cases. Thus Sargent, C. J., speaks of an execution *purchaser* as deriving his liability *from or through* the judgment-debtor. (*Ibid.*, p. 199). A Hindu reversionary heir does *not* claim *from or under* the widow or other female heir. (Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, 515). He does *not* claim *through* the female. (Nobin Chunder *v.* Issur Chunder, 9. W. R., 505, 507, F. B.) Deriving a right to sue from or through a person is very nearly the same as "claiming under a person." If A purchases from B a property of which the latter is wrongfully in possession, A may avail himself of B's possession, and add his own possession to complete the 12 years' possession, required by the Act. Acquiring possession from B is the cause of A's "liability to be sued." (Namdev *v.* Gomajid, I. L. R., 18 Bom., 37).

Surviving joint-tenant.

The survivor of two joint-tenants does *not claim* anything *under* the deceased joint tenant. He was seised of the whole even before such death. (See Richardson *v.* Younge, L. R., 10 Eq., 275 ; 6 Ch. App., at p. 481, cited by the Bombay High Court, at p. 178, I. L. R., 17 Bom.) The words "some person claiming under the mortgagee" in Art. 148, Act IX of 1871, mean some person claiming the *entirety* of the *mortgagee's* rights. (Bhagilal *v.* Amritlal, I. L. R., 17 Bom., 173).

Substituted representatives.

The plaintiff or defendant may be the heir, successor, executor, administrator, donee, legatee, devisee or assignee of the person from or through whom he derives his right to sue or liability to be sued. In the case of representatives, such as executors and administrators, where one is *substituted* for another in consequence of death or otherwise, the substituted representative has only the *same* cause of action as the representative for whom he is substituted. A substituted representative does *not derive* his title in any way from his predecessor in office. (Bigelow, Estoppel, 5th Ed., 148). Limitation would date as against an administrator *de bonis non* from the same period as it would have dated if the former executor or administrator had lived. A Hindu widow holds her deceased husband's property not merely for her own benefit but for the benefit, and as the *representative*, of the deceased. The reversionary heir though he does not claim through the widow does not (in the absence of a positive law) acquire a fresh right to sue on the death of such representative. If an ancestor is dispossessed, the cause of action of his heir accrues, not at the time when the ancestor dies, and when he could sue, but at the time when the ancestor was dispossessed, and ought himself to have sued. An immediate heir can have no fresh cause of action at the date of the ancestor's death, and a Hindu reversionary heir (in the absence of an *express* provision) can have no new right to sue on the death of a female representative of the ancestor, even supposing that such representative was dispossessed after the death of the ancestor. (Nobin Chunder *v.* Issur Chunder, 9 W. R., 505, 507, F. B. ; see notes under Arts. 140 and 141).

Hindu reversioners.

Mitakshara sons.

The sons of a Hindu father governed by the Mitakshara are not his representatives *qua* the family property. (Natasayyan *v.* Ponnusami, I. L. R., 16 Mad., 99, 102). The pious duty of a son to pay his father's debts arises when the debt is contracted or when the son is subsequently born. (*Ibid.*) But the debt is not payable until it falls due. (Ramayya *v.* Venkata, I. L. R., 17 Mad., 122, 130).

An execution-purchaser (generally) takes subject to all equities affecting the judgment-debtor, and will be bound by constructive notice in the same way as an ordinary purchaser. (Ramlochun *v.* Ramnarain

1 C. L. R., 296; Lakhmichand *v.* Kastur, 9 Bom. H. C. Rep., 60; Sobhagchand *v.* Bhaichand, I. L. R., 6 Bom., 193, at p. 202). As to the *liability* to be sued, it has been held that although the title of an execution-purchaser is derived from the judgment-debtor *against the will* of the latter, the former's liability none the less arises from the title which he has derived from the latter. (Ali Saheb *v.* Kaji Ahmed, I. L. R., 16 Bom., 197, 200). But it is clear that a distinction (however nice) may, and in some cases does, exist between the rights of a purchaser under a voluntary conveyance, and those of a purchaser at an execution sale. Thus, a partner in a firm cannot sell his share without the consent of his co-partners; but if his share is sold in execution, the execution-purchaser will get the right to have the accounts taken in order to ascertain and realise its value. (Deendyal *v.* Jugdeep, I. L. R., 3 Calc., 198, P. C.) At a sale in execution of a decree, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and *freed* from all alienations or encumbrances effected by him *subsequently* to the *attachment* of the property sold in execution. The judgment-debtor may by his conduct be precluded from denying the title of third parties who have dealt with his *benamidar*, but the execution purchaser will *not* be *estopped* by such conduct of the debtor. (Dinnendro *v.* Ram Coomar, 10 C. L. R., 281, 287, P. C.; I. L. R., 7 Cal., 107; Payapa *v.* Padmapa, I. L. R., 11 Bom., 45). A purchaser at an execution sale is not the representative of the judgment-debtor so as to be *estopped* by the conduct of the latter. (Lala Parbhu *v.* Mylne, I. L. R., 14 Cal., 401; Bashi *v.* Inayet, I. L. R., 20 Cal., 236). If, however, the execution-purchaser is also the *mortgagee* of the property (and he has completed his title by purchase in execution of a decree obtained on his mortgage), he will be treated as the judgment-debtor's representative and as such estopped by representations made by the latter. (Poresh Nath *v.* Anath Nath, I. L. R., 9 Cal., 265, P. C.) The correctness of the two Calcutta rulings in 14 and 20 Calc. is doubted by the Editor of the Madras Law Journal. (3 Mad. L. J., 123—128). It has not yet been held that an execution-purchaser of the rights of the party entitled to the *benefit* of the estoppel cannot take advantage of it.

Private purchasers and execution purchasers. Nice distinction between their rights.

There is as to *limitation* no distinction *in favor* of the purchaser at a judicial sale between his right, and that of a private purchaser. A person claiming under an ordinary assignment or conveyance as well as a person claiming under an execution sale must as regards *limitation* stand in the same position as the judgment-debtor whose rights are transferred. If the judgment-debtor has been out of possession of a property for 12 years, and barred by limitation, even an execution-purchaser of his rights cannot recover the property. (Rajah Enayet Hossein *v.* Girdharilall, 11 W. R., P. C., 29). But where the question is as to whether the possession of a purchaser of the mortgaged property in execution of a decree against the mortgagor is *adverse* to the mortgagee, the title of such a purchaser cannot be put on the same footing as the title of the mortgagor, or of a person claiming under a *voluntary* alienation from the mortgagor. Assuming that *no notice* of the existence of the mortgage was given to, or acquired by, the execution-purchaser, their Lordships of the Privy Council held that if there be no such notice, the possession of such purchaser is the possession of a person *claiming to be absolute owner*. The possession of the execution-purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee. Such possession is therefore *adverse* to the mortgagee.

What distinction, if any, as to limitation, between such purchasers.

(Anandomoyee *v.* Dhonendro, 16 W. R., P. C., 19). On this subject, see also Brojendro *v.* Chairman, 20 W. R., 223; Lala Parbhu *v.* Mylne, I. L. R., 14 Calc., 401, 413, 414. But, ordinarily, an execution-purchaser is *not* treated as a purchaser for value *without notice*. (Sobhag Chand *v.* Bhaichand, I. L. R., 6 Bom., 193, F. B.; Bhagwan *v.* Bhagwan, I. L. R., 9 All., 97, 108). The holding of a person who purchases property by asserting a right of *pre-emption is in acknowledgment* of all obligations created by the vendor. (Durga Pursad *v.* Shombhu, I. L. R., 8 All., 86).

Purchaser at a revenue sale.

An auction-purchaser of a whole estate at a revenue sale under Act XI of 1859 is relieved from any difficulty arising from the law of limitation, and is not conclusively barred by the acts or omissions of the former owner of the estate. (See Kuldip *v.* The Government, 11 B. L. R., 71, P. C., and Art. 121, Schedule II).

"Includes."

The word "includes" in sec. 3 shews that the definition is not exhaustive. (Balvantrao *v.* Puroshotam, 9 Bom., 99, and p. 206, *supra*)].

Sec. 3, continued. Terms defined.

* 'easement' includes also a right, not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another:

[See notes under sec. 26, and pp. 346, 347, 390, *supra*. A profit *à prendre*, such as a right of fishing in another's waters is an "easement" within the meaning of this Act. (Chundi *v.* Shib, I. L. R., 5 Calc., 945)].

'bill of exchange' includes also a *hundi* and a cheque:

[Native bankers call a bill of exchange a *hundi*. A "cheque" is a bill of exchange drawn on a banker and payable on demand. (See Act I of 1879)].

'bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligations shall be void if a specified act is performed, or is not performed, as the case may be:

[Single bonds, and bonds subject to a condition, are mentioned in Arts. 66, 67, and 68. The word "bond" occurs in Arts. 74, 75, and 80. (See Ball *v.* Stowel, I. L. R., 2 All., 322). A *tamasuk* is either a single bond or a promissory note. See notes to Art. 66].

'promissory note' means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

[A note which provides for repayment in these terms, namely, "I shall pay you whenever you may demand after you attain the age of majority" is a "promissory note," not "payable on demand," but payable after actual demand by the creditor after he shall have attained the age of majority. (K. Kuttiossan *v.* K. Suppi, 3 Mad. L. J., 199. See also notes under Arts. 72, 73, and 80)].

'trustee' does not include a *benamidar*, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title:

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* This definition is repealed in the territories to which the Indian Easements Act, 1882, extends. *Vide* sec. 3, Act V of 1882.

[A *benami* transaction does not create the relation of trustee and *cestui que trust* between the *benamidar* and the real owner. (Umasundary *v.* Dwarkanath, 11 W. R., 73 ; 2 B. L. R., 284). As to mortgagees in possession after the mortgages have been satisfied, not being trustees, see Baboolall *v.* Jamal, 9 W. R., 187; Brown, 305. A wrong-doer who enters on an infant's estate, in England, is, *in some respects*, considered as holding as a guardain or trustee. (Wall *v.* Stanwick, 34 Ch. D., 763, 767), but he is not a trustee within the meaning of the Law of Limitation. (See Darby and Bosanquet, 183, 184). The wrongful invasion or continuance in possession of a stranger, whether with or without knowledge of the infirmity of his title, will not make the wrong-doer (even) a constructive trustee unless he has been admitted into possession by a trustee so as to be affected with notice of the trust. (Palkonda *v.* Secretary of State, I. L. R., 5 Mad., 91)]. Who are not trustees?

'suit' does not include an appeal or an application:

[For the meaning of the word "suit" under the old law, see 9 W. R., 402 ; I. L. R., 2 Calc., 336 ; I. L. R., 1 All., 97, and pp. 188, 279 (note), *supra*. Applications for the execution of decrees are proceedings in *suits*, and sec. 647 of the Code of Civil Procedure does not apply to such proceedings. See sec. 4, Act VI of 1892. See also Mungle Persad *v.* Girijakant, I. L. R., 8 Calc., 51, P. C.; Ayyasami *v.* Sanija, I. L. R., 8 Mad., 82; Vishnu *v.* Achut, I. L. R., 15 Bom., 438, 440]. Proceedings in *suits*. Act VI of 1892.

'registered' means duly registered in British India under the law for the registration of documents in force at the time and place of executing the document, or signing the decree or order, referred to in the context:

[See Act XVI of 1864, XX of 1866, VIII of 1871, and III of 1877].

'foreign country' means any country other than British India;

[The settlement of Prince of Wales' Island, Singapore, and Malacca ; Chandernagore, Pondichery, and Goa ; Ceylon ; Cashmere, Cooch Behar, &c., &c., are foreign countries. Aden in Arabia, the Andaman and Nicobar Islands and the Laccadive Islands in the Indian Ocean, and Ajmere and Mairwara in the centre of Rajputana, are parts of British India. But the Berars are not included in British India. (Triccam *v.* B. B. & C. I. Railway Co., I. L. R., 9 Bom., 244, 249). The British station of Rajkot in Kathiawar (not having been ceded to Government in full sovereignty) is not a part of British India. (Queen *v.* Abdul, I. L. R., 10 Bom., 186). See p. 562, *supra*. Act IX of 1871 has been *adopted* in Cooch Behar as the law of limitation for suits, &c., instituted in the Courts of that "foreign country." Act XV of 1877 is in force in the Hydrabad assigned District (*out* of British India) by *executive* notification. See Stokes, Vol. II, p. 958]. British India and foreign country.

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

[The definition of this term, according to the Penal Code, is exactly the same. Absence of actual *mala fides* is not necessarily "good faith." The expression occurs in secs. 14 and 18. It occurred in sec. 10 and Arts. 133 and 134 of Act IX of 1871, but has been omitted in the corresponding provisions of this Act].

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

Sec. 4.

4. Subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

[Cf. sec. 4, Act IX of 1871.

Onus. Every suit, &c., must be brought within the time specified in the second schedule, unless there is something in the provisions of secs. 5 to 25 of the Act which absolves the plaintiff, &c., from that necessity. The *onus* is on the plaintiff to prove these exceptional circumstances. (See Mahomed *v.* Eakoob, 24 W. R., 181 and 182; 4 Central Provinces Law Reports, 57, and p. 111, *supra*). If the *defendant* alleges that a *shorter* period of limitation is applicable to the suit, it lies on *him* to prove such facts as will shorten the period. (Mohan Sing *v.* Conder, I. L. R., 7 Bom., 478).

Sec. 4, where applicable. This section applies to suits, appeals and applications, provided for in the second schedule of *this* Act. (Degumber *v.* Kalinath, I. L. R., 7 Calc., 654; 9 C. L. R., 265, 269). For a similar provision as to suits, appeals and applications under the Bengal Tenancy Act, see sec. 184 of Act VIII of 1885.

Where inapplicable. Depositing money or giving security, after the time prescribed by any law, is not governed by sec. 4. For an instance, see Burjore *v.* Bhagana, I. L. R., 10 Calc., 557. See note 2, p. 183, *supra*.

The section is also inapplicable to acts which the Court performs *suo motu*, and according to Mr. Justice Mahmud to acts which the Court *may* perform *suo motu*. The mere fact that one of the *parties* has made an application asking the Court to exercise that power does not render the action of the Court subject to the rule of limitation. (See Robarts *v.* Harrison, I. L. R., 7 Calc., 333; Vithal *v.* Rokmi, I. L. R., 6 Bom., 586; Kylasa *v.* Ramasami, I. L. R., 4 Mad., 172; Dhansing *v.* Basantsing, I. L. R., 8 All., 519, at p. 534).

"Subject to the provisions."—Not subject to all the provisions, but such provisions as are applicable and pertinent to the particular case. (See Jawahir *v.* Narain, I. L. R., 1 All., 644, 646; Banee *v.* Haran, 24 W. R., 405, 406).

Prescribed period can not be extended. No act of the parties or even of arbitrators (unless it is within the purview of some provision of the law) can extend the period of limitation. (Jehander *v.* Munno, 1 Agra, 248; Davis *v.* Abdool, 8 W. R., 55; see also pp. 34, 35, *supra*). No rule of Court can prevent the operation of the Law of Limitation. (Kambinayani *v.* Uddighiri, 2 Mad., 268). The Judge cannot, on equitable grounds, enlarge the time allowed by law, postpone its operation, or introduce exceptions not recognized by it. (See pp. 182, 183, *supra*).

"Shall be dismissed, although limitation has not been set up as a defence." See pp. 76, 81, 84 and 237, *supra*. It should be observed that even an arbitrator who finds the plaintiffs' claim barred by statute is bound to disallow it. (*In re* River Steamer Company, 6 Ch. 822, at p. 827).

Even arbitrators are bound by the law.

This penalty of dismissal must be enforced even if the defendant abandons the plea of limitation, or is willing to confess judgment.

(See Bhawani *v.* Bisheswar, I. L. R., 3 All., 846; Deb Narain *v.* Ishan, 13 C. L. R., 153, 155). See also a ruling of the Punjab Chief Court cited at p. 15 of Rivaz on Limitation, 3rd Ed. But in Ram Chunder Sing *v.* Ram Janam Sing (Appeal from original decree No. 246 of 1891, decided on the 9th of June 1893), Macpherson and Banerji, JJ., appear to have been of a somewhat different opinion. The plaintiff in that case, sued for his share of certain joint-debts collected by his co-sharers A and B, sometime previously to the institution of the suit. A denied liability and pleaded limitation under Art. 62, but B admitted that a certain amount was payable by him to the plaintiff. The first Court gave the plaintiff a decree for the amount admitted by B, and dismissed the suit as barred by limitation against A. The plaintiff appealed on the ground that the suit against A was not barred by limitation, and B appealed on the ground that the suit was as much barred against him as it was barred against A. The learned Judges refused to entertain the question of limitation urged by the defendant B in his appeal. As a rule, however, the point of limitation is one which, whether it be taken by the defendant or not, the Court is bound to entertain. (Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 658).

Confessing judgment in a barred suit.

The obligation resting on the Court of first instance (or the Court of appeal) to dismiss a suit (or an appeal) which is barred by limitation is not laid on each successive Court whenever the objection comes to view. (Dattu *v.* Kasai, I. L. R., 8 Bom., 535). The first Appellate Court is *bound* to decide the question whether the appeal before it is barred by limitation, but *not* whether the *suit* in the Court of first instance was so barred. Similarly, if the question is not raised by the appellant, the High Court in second appeal is not *bound* to consider whether the suit or the first appeal was barred by limitation. (Ahmad Ali *v.* Waris, I. L. R., 15 All., 123). But cf. Illustration (*a*).

Is each successive Court *bound* to dismiss suit?

Notwithstanding sec. 4 of the Limitation Act, the appellant has no *right* (by reason of secs. 541 and 542 of the Code of Civil Procedure) to raise orally at the hearing a plea of limitation as regards the suit (or the appeal) in the Court below, if such plea has not been taken in the memorandum of appeal. But the *respondent* may support the decree of the Court below, by showing that the appellant's suit (or appeal) was time-barred when it was presented in the Court below, although he had not raised this question there. (*Ibid.*)

Instead of dismissing the suit, the Court may allow the plaintiff to withdraw his suit in order that he may proceed against the defendant in a foreign Court, where the law of limitation may not be the same as that of British India. (Naronji *v.* Megniram, I. L. R., 6 Bom., 103, 107).

Is withdrawal permissible?

If the question of limitation has been finally decided (directly or indirectly) between the parties, it cannot be raised again in a subsequent stage of the same case. See p. 82, *supra;* Mungul Pershad *v.* Grijakant, I. L. R., 8 Calc., 51, P. C. (where proceedings had been allowed); Bandy *v.* Romesh, I. L. R., 9 Calc., 65 (where proceedings had been disallowed). As to the plea of limitation, *after* a remand on the merits, see 5 W. R., 91, F. B.; and pp. 81, 82, *supra.*

Previous final decision.

Remand on the merits.

The Court of first instance dismissed a suit as barred by limitation. In appeal that decision was reversed, and the case was remanded under sec. 562 of the Civil Procedure Code (Act XIV of 1882). Against the order of remand the defendant appealed to the High Court under clause 28 of section 588 of the Civil Procedure Code. It was contended by the plaintiff that the High Court had no power to decide the point of limitation, but could only consider whether the

Remand on the merits.

order of remand satisfied the requirements of sec. 562 of the Civil Procedure Code. But it was held that in an appeal against such an order of remand though the Court-fee paid is Rs. 2 only, the power of the High Court is not confined to the question whether that order satisfies the requirements of sec. 562; but may also determine the correctness of the Lower Appellate Court's decision on the preliminary point on which the Court of first instance disposed of the case. (Bhau Bala *v.* Bapaji Baperji, I. L. R., 14 Bom., 14, F. B.)

The Munsiff dismisses a suit as barred by limitation; the Judge, on appeal, sets aside the Munsiff's decision and remands the suit for re-investigation on the merits. The Munsiff then gives the plaintiff a decree in full; the Judge, on appeal, disallows a part of the claim; the plaintiff appeals to the High Court. The defendant prefers a cross-objection to the Judge's finding of fact as to the part decreed.

Court bound, though *party* estopped.

The High Court, it has been held, is *bound* to consider the question of limitation, although it is not open to the *respondents* to take this objection of themselves. (Ambala *v.* Naduvakat, I. L. R., 6 Mad., 325). It may be remarked that the respondents in this case were *not precluded* by any *final* decree from pressing their objection of limitation. See note 3, p. 82, *supra*. A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause, within the meaning of sec. 5 of the Limitation Act, for the appellant in that Court not presenting the appeal within the period of limitation prescribed does not preclude the High Court from considering that decision in appeal. (Bechi *v.* Ahsanullah, I. L. R., 12 All., F. B., 461). It has, however, been held that sec. 4 of the Limitation Act does not override the restriction imposed upon an *appellant* by sec. 542 of the Code of Civil Procedure. (Ahmad Ali *v.* Waris, I. L. R., 15 All., 123, F. B.) The defendant cannot, it is true, waive the plea of limitation, but he may waive his right of *appealing* against a wrong decision on the question of limitation. But cf. Illustration (*a*).

Plea of limitation after execution sale.

A judgment-debtor cannot raise the plea of limitation in respect of execution-proceedings under which his property has already been sold and purchased by a third party. (Gangathara *v.* Rathabai, I. L. R., 6 Mad., 237). But cf. Mena Kumari *v.* Jagat, I. L. R., 10 Calc., 220, in which the decree-holder's purchase of the debtor's property in execution was set aside in a *regular suit* on the ground that the execution was barred by limitation, and that the High Court had so decided after the confirmation of the sale.

Where barred portion is not subject of appeal.

If the whole case is not before the Appellate Court, it cannot take notice of the question of limitation affecting that part of the order which is not before it. (Rughu Nath *v.* Pareshram, I. L. R., 9 Calc. 635; p. 83, *supra*).

Costs of suit.

Where the defendant successfully pleads limitation, the suit must be dismissed with costs, even if the plea is used for the purpose of refusing to perform admitted obligations. (Banning, 233; L. R., 17 Eq., 75).

Where, however, the defendant does not plead limitation at the first stage of the case, the Court may refuse to award costs to him. (See Narasimma *v.* Rajupathi, I. L. R., 6 Mad., 176, 178; and p. 84, *supra*).

Merits.

A question of *limitation* is generally spoken of as distinct from the *merits* of the case. (See Beng. Reg. III of 1793, sec. 562, Civil Procedure Code of 1882, and pp. 41, 89, *supra*). But when there is an objection to the jurisdiction of the Court or to the form of the suit,

such objection must be heard before the question of limitation is determined, and in such cases, the plea of limitation is spoken of as an objection with respect to the *merits* of the case. (See the judgment of Hatherly, L. C., in Burditt *v.* Garrick, L. R., 5 Ch., 233, at p. 239)].

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator. Sec. 4, Expl.

["Ordinary cases."—Not pauper suits, nor claims made before the official liquidator, nor as regards new plaintiffs or defendants substituted or added after the institution. See p. 237, *supra*.

"When the plaint is presented to the proper officer."—The suit is instituted, whether the defendant has been served with a summons or not. As to the effect of non-service of summons, see sec. 99A, Civil Procedure Code; see also Ramkissen *v.* Luckeynarain, I. L. R., 3 Calc., 312, and Gerender *v.* Juggadamba, I. L. R., 5 Calc., 126, for the old rules of the Calcutta High Court. It is irregular to return a plaint on the ground that the defendants could not be served with summonses. A second presentation of the plaint in such a case is not contemplated by the Legislature, and such irregularity of the Court cannot operate to the injury of the plaintiff. (Rivaz, 3rd Ed., Addenda). Delay in the appointment of a guardian *ad litem* for a minor defendant does not affect the date of institution. (Khem Karn *v.* Har Dayal, I. L. R., 4 All., 37). Delay in the registration of the suit does not, also, affect the date of its institution. Delay in filing a certificate under the Pensions Act, XXIII of 1871, or in appointing a guardian *ad litem* for a minor plaintiff does not affect the date of institution. (Jijaji *v.* Balkrishna, I. L. R., 17 Bom., 169, 172). Presented and instituted.

"Presented."—Where the plaint was really presented on the 29th July, it would not matter if the endorsement on the plaint stated that it was presented on the 31st July, or that it was not accepted until the later date. (Young *v.* MacCorkindale, 19 W. R., 159).

A plaint should not be received unless it is presented by the plaintiff or by a pleader or agent on his behalf. The Court may refuse to accept plaints (or petitions) sent by post, but if the Court accepts the plaint, or acts upon it, the suit is sufficiently instituted on the date of such acceptance. (Sankarnarayana *v.* Kunjappa, I. L. R., 8 Mad., 411). It has been held in the Central Provinces that a suit is not instituted by presenting to the clerk of the Court a plaint which is insufficiently stamped and *is not received*. (Vinayak *v.* Madho, 1 Central Prov. Law Rep., 99). But the proper officer of the Court will ordinarily receive an insufficiently stamped plaint. (See sec. 54 of the Code of Civil Procedure). A plaint or a memorandum of appeal, which is wholly *unstamped*, cannot according to the Allahabad High Court be treated as an *insufficiently* stamped plaint or memorandum of appeal. (Bishnath *v.* Jagarnath, I. L. R., 13 All., 305, at p. 309). It is otherwise in Madras. (See Patcha *v.* Sub-Collector, I. L. R., 15 Mad., 77, 78). Refusal of officer to accept. Wholly unstamped plaints.

There is a difference between the *presentation* of the plaint or memorandum of appeal and the *admission* of the suit or appeal. That distinction is recognized by secs. 58 and 59 of Act XIV of 1882, with regard to suits, and by sec. 548 in the case of appeals. (Jainte *v.* Bachu, I. L. R., 15 All., 65, 67). The plaint is admitted or registered Presentation and admission.

after necessary amendments and *after* payment of the required amount of Court-fee. (Moti Sahu *v.* Chattridas, I. L. R., 19 Calc., 780, 782).

Amendments of plaints or applications.

The date of institution is the date of the first presentation of the plaint. (Khem Karn *v.* Har Dayal, I. L. R., 4 All., 37). If the plaint is returned for insufficiency of stamp or for any amendment, and then it is presented again within the time allowed, or within a reasonable time, the date of the first presentation is the date of institution. The same remark applies to appeals. (See Ram Lal *v.* Harrison, Sheo Partab *v.* Sheo Ghulam, I. L. R., 2 All., 832, 875; Jagannath *v.* Lalman, I. L. R., 1 All., 260; Mengur *v.* Baboo Hurree, 23 W. R., 447). The later cases on this subject are referred to below. When the original application is amended by a second application giving certain particulars which had been omitted from the first, the two applications become an entire application, dating from the date when the first application was presented. (MacGregor *v.* Tarini, I. L. R., 14 Calc., 124, 127). A plaint may be amended even after it has been registered (sec. 53, Act XIV of 1882), but an application for execution, it has been held, cannot be amended after it has been admitted and an order for execution made under sec. 245 of the Code. (See Asgar *v.* Troylokya, I. L. R., 17 Calc., 631, at pp. 636, 641, F. B.)

Appeal not presented if necessary copies not filed.

It has been held by the Punjab Chief Court that an appeal is not *presented* within the meaning of the first paragraph of sec. 4 if it is not accompanied by the copies of decree and judgment required by sec. 541 of the Civil Procedure Code. (See Rivaz, 3rd Ed., p. 17). It has also been held by a Full Bench of the Allahabad High Court that an appeal under the Code of Civil Procedure is not presented within the meaning of sec. 4 unless it is accompanied by the copies required by the Code. (Balkaram *v.* Gobind, I. L. R., 12 All., 129, at p. 138). According to the Madras High Court, the appellant in *second* appeal is not required to file a copy of the decree of the Court of *first* instance. (Pirathi *v.* Vencatraman, I. L. R., 4 Mad., 419, F. B.) Copies of decrees of *both* the Courts below are required to be filed in the Calcutta High Court.

Allahabad Full Bench decision on insufficiency of stamp.

It has been held by the Allahabad High Court, that if a memorandum of appeal is not, when tendered, properly stamped, it is not at that time a memorandum of appeal, and that the appeal cannot be regarded as having been at that time *presented*. The subsequent affixing of the full stamp cannot have a *retrospecti·e* effect so as to validate the original presentation unless it has been done by order of the Court, and the Court cannot make any such order unless the memorandum has, through *mistake* or *inadvertence* on the part of the *Court or its officers*, been received, filed or used. (Balkaran *v.* Gobind, I. L. R., 12 All., 129, F. B.) It has been held that the same principle applies to an insufficiently stamped application for a review of judgment. (Muuro *v.* Municipality, I. L. R., 12 All., 57).

But sec. 582A, inserted by Act VI of 1892 after sec. 582 of the Code of Civil Procedure, enacts as follows :—

Sec. 582A, Civil Procedure Code.

"If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped, and the insufficiency of the stamp was caused by a mistake on the part of the *appellant* or *applicant* as to the amount of the requisite stamp, the memorandum of appeal or application shall have the same effect and be as valid as if it had been properly stamped : Provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time, after the discovery of the mistake, to be fixed by the Court." These provisions

apply to every appeal and review of judgment heard after the 29th July 1892, when Act VI of 1892 was passed. (See sec. 5, Act VI, of 1892). It would thus appear that the "mistake or inadvertance" referred to in sec. 28 of the Court Fees Act was *not* intended (at least, in cases of appeals and reviews) to be restricted to mistake or inadvertence on the part of the *officers* of the Court. And it may be mentioned that the Madras High Court followed Skinner *v.* Orde, I. L. R., 2 All., 241 (P. C.) and expressly disapproved of the decision in Balkaran *v.* Gobind, I. L. R., 12 All., 129, F. B. (See Chennapa *v.* Raghunath, I. L. R., 15 Mad., 29; Patcha *v.* Sub-Collector, I. L. R., 15 Mad., 77). The Calcutta High Court in one case, without expressing its concurrence in the Allahabad decision, dismissed an appeal on the ground that the memorandum of appeal had been insufficiently stamped and that the deficiency was supplied after the period of limitation, under orders which did not come within either the spirit or the letter of sec. 28 of the Court Fees Act. The officer of the Court had received the memorandum with the express remark that it was insufficiently stamped. (Yakutunnissa *v.* Kishori, I. L. R., 19 Calc., 747).

Mistake of parties, *or* of officers of Court.

It has been held in Calcutta that under sec. 54 of the Code of Civil Procedure, the Court may allow a plaintiff in the case of a deficiency of stamp-duty paid on the *plaint* to supply the deficiency even after the period of limitation for the suit has expired. (Mati Sahu *v.* Chhatridas, I. L. R., 19 Calc., 780; Harimohun *v.* Naimuddin, I. L. R., 20 Calc., 41). The Allahabad High Court have, on the other hand, held that sec. 54 of the Code, by itself, does not give a Court any power thus to extend the ordinarily prescribed period of limitation for *suits*. (Jainti *v.* Bachu, I. L. R., 15 All., 65). If, however, the insufficiency of the stamp is not discovered before the admission of the plaint, the Court, finding that it has by *mistake* or *inadvertence* received or filed or used the plaint, may, under cl. 2 of sec. 28 of the Court Fees Act, allow the plaintiff to put in the requisite stamp though the period of limitation has already expired. (I. L. R., 15 All., 65, at p. 71).

Sec. 54, Civil Procedure Code and sec. 28, Ct. Fees Act.

Where a person *deliberately* presents an application, memorandum of appeal, or a plaint, without the requisite amount of Court-fee, intending thereby to gain time, it is apprehended that neither sec. 28 of the Court Fees Act, nor the new sec. 582A of the Code of Civil Procedure, will save him from the bar of limitation. (See the remarks of Edge, C. J., at pp. 70, 71, of I. L. R., 15 All.) But under secs. 54 and 582 of the Code of Civil Procedure, the Calcutta High Court would give the plaintiff or the appellant the benefit of these provisions, without considering the question as to how the insufficiency of the stamp was caused and whether there was any mistake on the part of the plaintiff, the appellant, or the officers of the Court. (See Mati *v.* Chattridas, I. L. R., 19 Calc., 780; Hurimohun *v.* Naimuddin, I. L. R., 20 Calc., 41; Syud Ambur *v.* Kali, 23 W. R., 258).

Where there is no mistake as to insufficiency of stamp.

It has been held that an insufficiently stamped petition to the High Court for the rehearing of a suit which has been dismissed by the Presidency Small Cause Court cannot (under sec. 71 of the Presidency Small Cause Courts Act) be perfected by stamping it properly *after* the period of limitation for such a petition has expired. (Norrendro Nath *v.* Abinash, I. L. R., 18 Calc., 445).

Sec. 71, Precy. S. C. Ct. Act.

"Proper officer."—Under sec. 48, Civil Procedure Code, the plaint must be presented to the Court or such officer as it appoints in this behalf. (See Nundvallabh *v.* Alibbai, 6 Bom., 254). A plaint may not be presented at the private residence of the Judge or officer. (See

Private house of officer.

Jaiknar *v.* Heera, 7 N. W. P., 5; *contra*, Muddun *v.* Tabir, Sutherland's S. C. Ct. Ref., 36).

Pauper application and plaint.

"Application for leave to sue as a pauper."—See sec. 410, Civil Procedure Code. Limitation depends on the date of the application, and not on the day when the application is granted and registered. (Seetaram *v.* Goluck, Marshall, 174; Khem Karn *v.* Har Dayal, I. L. R., 4 All., 37). This rule applies even where the applicant, *pending* an enquiry into his pauperism, pays the Court-fees and gets his application numbered and registered as a plaint, provided his original application was a *bonâ-fide* one. The application for leave is neither granted nor refused, but the case approaches more nearly the state of things which arises when the application is granted. (Skinner *v.* Orde, I. L. R., 2 All., 241, P. C. Cf. Ramsahai *v.* Maniram, I. L. R., 5 Calc., 807). The principle of the Privy Council ruling does not apply if the pauper's application for leave is *rejected, before* he pays the Court-fees. (Bishnath *v.* Jagarnath, I. L. R., 13 All., 305).

Liquidator.

"Official liquidator."—An official liquidator is appointed by the Court for the purpose of conducting proceedings in winding up a company and assisting the Court therein. See Act X of 1866, which has been repealed and re-enacted by Act VI of 1882.

The rule enacted by the explanation is modified by sec. 22, so far as concerns new plaintiffs or defendants, substituted or added after the institution of the *suit*. See p. 196, *supra*, and the notes to sec. 22.

Officer in charge of jail.

In the case of appeals by prisoners in jail, presentation of the petition of appeal to the officer in charge of the jail is, for the purpose of the Limitation Act, equivalent to presentation to the Court. (Queen-Empress *v.* Lingya, I. L. R., 9 Mad., 258).

Registrar's summons.

An application is not made or commenced on the date on which a Registrar's summons is taken out calling on the other party to attend the hearing of the application on a future date. (Khetter *v.* Kassy, I. L. R., 20 Calc., 899). The Registrar's summons is only a notice signed by the Registrar at the request of the party who intends to make the application. (*Ibid.*)].

Illustrations.

Sec. 4, Illustrations.

(*a*). A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

[But if the defendant does not appeal, or if the judgment is not otherwise set aside, it remains in full force. If a Court erroneously holds that a suit or application is not barred by limitation, the order is not *ultra vires*, but remains in full force until set aside in due course. (Mahomed *v.* Purunder, I. L. R., 11 Calc., 287, 292)].

(*b*). An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

[This overrides the decision of Sir Barnes Peacock in Bharrut *v.* Issurchunder, 8 W. R., 141. This illustration has been acted upon in Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 659; Nobin *v.* Brojendro, 12 C. L. R., 541, 545; Moshaullah *v.* Ahmedullah, I. L. R., 13 Calc., 78. An order dismissing an appeal under this provision is a decree from which a second appeal lies. Gungadass *v.* Ramjoy, I. L. R., 12 Calc., 30. If the appeal is decreed, notwithstanding the provisions of sec. 4, the respondent in the Court of first appeal may, of course prefer a second appeal against such decree. Cf. I. L. R., 15 All., 123].

5. If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens:

Sec. 5, cl. 1. Proviso, if Court is closed when period expires.

[Cf. sec. 5, Act IX of 1871.

It has been held in Madras that in computing the period of 89 days from the date of decree, within which an application for review of judgment may be presented on *paying half* the *ad valorem* fee (under Art. 5, Sched. I of the Court Fees Act, 1870) the time during which the Court is closed for vacation cannot be excluded. (*In re Kota*, I. L. R., 9 Mad., 134). This period of 89 days is *not* a "period of limitation prescribed for any suit, appeal or application."

Period for seeing, appealing or applying.

"Period of limitation prescribed."—These words occur in cl. 1 as well as in cl. 2. In Degumber *v.* Kalinath, I. L. R., 7 Calc., 654, 659 ; 9 C. L. R., 265, a Division Bench of the Calcutta High Court observed that in cl. 2 these words must be read with sec. 4 of the Act, and that they referred to the period prescribed by the second schedule annexed to the Limitation Act, and not to any period prescribed by any other Act. See Luvar *v.* Luvar, I. L. R., 5 Bom., 688, for a similar meaning of the expression "prescribed period" in Part III, Act IX of 1871. But the current of decisions is opposed to this view. Thus clause 1 has been applied to suits for which periods of limitation are specially prescribed by the Registration Act and the Bengal Rent Act (see pp. 217, 218, *supra*). Sec. 5, cl. 2, has been applied in Madras, to excuse a delay in filing an appeal for which a period of limitation is prescribed by a local and special law. (Reference under Madras Forest Act, I. L. R., 10 Mad., 210). The Code of Civil Procedure is neither a special nor a local law. A rule enacted in a general law of limitation is therefore applicable to applications under a general Code of Civil Procedure. (M. Phoolbas *v.* Lalla, I. L. R., 1 Calc., 226). An application for execution of a decree under sec. 230 of the Code of Civil Procedure may on this ground be made on the day the Court re-opens immediately after the expiry of the 12 years allowed by that section. But the Calcutta High Court have come to the same conclusion on the assumed existence of a "broad principle" of law *independently* of the provisions of sec. 5. (See Pearymohun *v.* Anunda, I. L. R., 18 Calc., 631).

Period *prescribed* by Act XV *and* by *other* Acts.

"When the Court is closed."—If the Court is not actually re-opened on the day that it should be re-opened after a vacation, the Court is on that day "closed" within the meaning of sec. 5. (Bishan *v.* Ahmad, I. L. R., 1 All., 263). It has been held by the Madras High Court (Innes, J., dissenting), that the Court may be open within the meaning of this section, even during the annual vacation, and on public holidays, if the *offices* of the Court are open for the presentation of pleadings and other papers. (Nachiyappa *v.* Ayyasani, I. L. R., 5 Mad., 189 ; Pravatheesam *v.* Bapanna, I. L. R., 13 Mad., 447, at p. 451). The Bombay High Court is of the same opinion. (See Shivram *v.* Bhavania, printed judgments, 1886, p. 262 ; Starling, 2nd Ed., p. 18). But in the Calcutta High Court the practice is to file appeals on the day the Court fully re-opens after the holidays.

When *court* is *closed*.

Section 7 of the General Clauses Act I of 1887 extends the principle of sec. 5, cl. 1, to the doing of an act or the taking of any proceeding in a Court *or office* where such act or proceeding is to be done or taken within a limited time allowed by any Act passed after the 14th January 1887. Even before this enactment, the principle of the rule laid down in cl. 1, sec. 5, Act XV, was applied to cases of depositing money within a time prescribed by order of Court, or by

Period for *doing an act*. Act I of 1877.

any law. (See Burjour *v.* Bhagana, I. L. R., 10 Calc., 557, P. C.; *In re Soorjmookhi Koer*, I. L. R., 2 Calc., 272; Hossein *v.* Donzelle, I. L. R., 5 Calc., 906; Dabidin *v.* Muhamed, I. L. R., 3 All., 850; and p. 183 (note), *supra*).

Court acting on a holiday.

Under sec. 15, cl. 3, Act XII of 1887, a judicial act done by a Civil Court on a gazetted close holiday shall not be invalid by reason only of its having been done on that day. Under the old law this was, at the furthest, an irregularity, which could be waived by the conduct of the parties. (Ram Das *v.* The Official Liquidator, I. L. R., 9 All., 366)].

Depositing money and applying to set aside a sale under sec. 174, Act VIII of 1885.

Where a tenure is sold for arrears of rent under the Bengal Tenancy Act of 1885, the judgment-debtor, under section 174 of the Act, may apply to have the sale set aside on his depositing in Court for payment to the decree-holder the amount recoverable under the decree with costs, and for payment to the purchaser a sum equal to 5 per cent. of the purchase-money; and if the Court be closed on the last day of the period limited, the judgment-debtor may, it has been held, pay the said sum into Court and make his application, on the first day the Court re-opens, *notwithstanding* the *absence* of any *express* provision to that effect. (Shoshee Bhusan Rudro *v.* Gobind Chunder Roy, I. L. R., 18 Calc., 231). So far as the application to set aside the sale is concerned, this ruling would seem to be opposed to the principle laid down by the Full Bench in the case of Rajkristo *v.* Dinobundhoo, 3 W. R., S. C. Ct. Ref., 5. It should also be noted that the provision of sec. 5, cl. 1, of Act XV of 1877, is expressly made applicable to certain suits and appeals, and to such applications only as are made for the execution of decrees or orders. (See secs. 184 and 185 of Act VIII of 1885, and Sch. III of the same Act). Sec. 5, cl. 1, would therefore seem to be inapplicable to applications to set aside a sale under the Bengal Tenancy Act. But Petheram, C. J., and Beverley, J., referring to the decision in I. L. R., 18 Calc., 231, have held that independently of sec. 5, cl. 1, there is a "broad principle" which entitles every applicant to the benefit of the rule expressly laid down in clause 1 of section 5. (See Pearymohun *v.* Anunda, I. L. R., 18 Calc., 631, 635). So far as the act of *depositing* the money is concerned, this broad principle is recognised in the *older* cases, though it is observable that the Legislature has expressly extended the principle of sec. 5, cl. 1, of Act XV of 1877, to acts to be done within a time limited by any Act passed *after* the 14th January 1887. (See sec. 7 of the General Clauses Act I of 1877, and p. 183, *supra*)].

Existence of a "broad principle" *independently* of cl. 1, questioned.

Sec. 5, cl. 2. Proviso as to appeals and applications for review.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

[This clause corresponds to secs. 333 and 377 of Act VIII of 1859, and applies only to appeals and applications for reviews of judgments. It may apply to a substantive cross-appeal, but not to a petition of cross-objections. (Degamber *v.* Kalinath, I. L. R., 7 Calc., 654, 659). It did not apply to the filing of a notice of cross-objections under sec. 561 of the Civil Procedure Code as amended by Act XII of 1879, (Kally *v.* Mongola. I. L. R., 9 Calc., 631). But under sec. 48, Act VII of 1888, the Appellate Court may now allow the respondent additional time for filing his cross-objections. Sec. 5, cl. 2, does not also apply to an application for leave to appeal *in formâ pauperis* (Lakshmi *v.* Ananta, I. L. R., 2 Mad., 230; Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at pp. 487, 488). In the case of an application for leave to appeal

Amended sec. 561, Civ. P. Code, gives Court discretion.

as a pauper (Art. 170), the Court cannot admit the application after the thirty days even if it is satisfied that the applicant had sufficient cause for not making the application within such period. (Parbati *v.* Bhola, I. L. R., 12 All., 79). This clause did not apply to applications under (the repealed) Arts. 171 and 171*b* (*In re Ram Shanker*, 3 C. L. R., 440, 442; Benode *v.* Sharat, 10 C. L. R., 449, 451. (But as to such applications, after Act VII of 1888, sec. 372A, Civil Pro. Code, now expressly provides that the provisions of sec. 5 applicable to *appeals* shall apply to them. Sec. 5, cl. 2, does not apply to an application for leave to appeal to Her Majesty in Council (see Jowahir *v.* Narain, I. L. R., 1 All., 644; In the matter of Sita Ram Kesho, I. L. R., 15 All., 14). Act VII of 1888, sec. 32, expressly extends the provisions of both clauses of sec. 5 of Act XV of 1877 to applications under secs. 365, 366, 368, and 371 of the Civ. Pro. Code. (See Arts. 171, 175A, 175B, and 175C of the amended Limitation Act, and sec. 372A of the amended Civil Procedure Code). Sec. 5, cl. 2, does not apply to *suits*. The Court has no power, even for what it considers a sufficient cause of delay, to entertain a *suit*, or an application (other than an application for review or an application referred to in sec. 372A of the Code of Civil Procedure) instituted after the time allowed by law. (See Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at p. 486).

Applications for *leave* to appeal.

Application for substitution of names, sec. 372 A, Civ. P. Code.

Cl. 2 not applicable to suits.

"Sufficient cause, &c."—A similar expression is used in the last paragraph of sec. 368 of Act XIV of 1882. (See Benode *v.* Sharat, 10 C. L. R., 449, 453). The Court has no discretion in the matter until a sufficient cause in point of law has been laid before the Court. Even a mistake on the part of the plaintiff's attorney, specially where no application is made at the earliest opportunity after the discovery of the mistake, is not sufficient (The Corporation of Calcutta *v.* Anderson, I. L. R., 10 Calc., 445). Mere ignorance of the law is not a "sufficient cause" under sec. 5. (Sitaram *v.* Nimba, I. L. R., 12 Bom., 320). An allegation of a mere miscalculation of time is not ordinarily sufficient (Zaibulnessa *v.* Kulsum, I. L. R., 1 All., 250). A *bonâ fide* mistake made by the appellant in respect of the period of time to which he is entitled may under certain circumstances be a "sufficient cause." Where the plaintiff had valued his suit at more than Rs. 5,000 and the first Court on the objection of the defendant decided that the value of the subject-matter of the suit was below Rs. 5,000, it was held that the defendant (against whom the suit was decreed on the merits) might *bonâ fide* believe that the appeal would lie to the High Court, and that he would have 90 days instead of only 30 days for preferring his appeal, and that this with the other circumstances of the case might constitute a "sufficient cause" within the meaning of sec. 5. (Huro Chunder *v.* Surnomoyi, I. L. R., 13 Calc., 266, and Krishna *v.* Chathappan, I. L. R., 13 Mad., 269. But cf. Ramjiwan *v.* Chand, I. L. R., 10 All., 587, and Jaglall *v.* Harnarain, I. L. R., 10 All., 524). A *bonâ fide* mistake in law, it has been held by the Madras High Court, may, under certain circumstances, be a "sufficient cause" within the meaning of sec. 5. Krishna *v.* Chathappan, I. L. R., 13 Mad., 269. But Mahmood, J., is of opinion that there can be no such thing as a *bonâ fide* mistake of law, for good faith implies due care and caution, and a knowledge of law is a duty imposed upon every human being who lives under the protection of law. (Ramjiwan *v.* Chand, I. L. R., 10 All., 587; see also Sitaram *v.* Nimha, I. L. R., 12 Bom., 320). The learned Judge refers to and dissents from Huro Chunder Roy *v.* Surnomoyi, I. L. R., 13 Calc., 266. (Bechi *v.* Ahsanullah Khan, I. L. R., 12 All., 461, at p. 481).

What is, or is not, a sufficient cause.

Is ignorance or mistake of law "sufficient cause?"

Where a decree was first appealed against as an order, and, such appeal being dismissed, a fresh appeal in the form of an appeal from

Bonâ fide pursuing a wrong remedy.

Poverty.

Illness.

Absence of Mookhtear.

Negligence.

Trustee's appeal.

"Sufficient cause," to be *liberally* construed.

Dispute as to court-fee.

Counsel's *laches*.

Crossappeal after withdrawal of appeal.

a decree was preferred after the prescribed period, the appeal was admitted by the Allahabad High Court. (Rivaz, p. 25). *Bonâ fide* pursuing a wrong remedy may be a "sufficient cause" (Husaini *v.* The Collector, I. L. R., 9 All., 655, at p. 658), but the poverty of the appellant, and the fact that she is a *purda nashin* lady, do not constitute a "sufficient cause." (*Ibid.* See also Moshaullah *v.* Ahmedullah, I. L. R., 13 Calc., 78). The fact that the appellant was a woman, widow, and not in very good circumstances, does not constitute a proper ground for the admission of an appeal after the prescribed time. (Chamoo *v.* Musst. Ooji, 3 Cent. Pro. L. R., 125).

A mere plea of the appellant's illness is not sufficient cause for not filing an appeal in the District Court until more than fifty days have expired from the date of the decision (Mazoom *v.* Panchoo, 1 W. R., Misc., 23). The absence (from illness) of the Mookhtear, if the client did not know it, may be sufficient (Annundmoyee *v.* Poorno Chunder, 9 Moore, 26). The fact that a Full Bench decision or a Privy Council Ruling has altered the view of the law which prevailed at the time of the decision of the original suit is not a sufficient cause for delay (Makhan *v.* Manchand, 5 Bom., 107; Madho *v.* Rukman, I. L. R., 2 All., 287; see also Shama Churn *v.* Bindabun, 9 W. R., 181, F. B.; Punchanun *v.* Gooroodas, 18 W. R., 317; Jadub *v.* Ram, 19 W. R., 189). Negligence, carelessness, or want of means at the time on the part of the applicant would not be "sufficient cause" within the meaning of sec. 5. (Per Edge, C. J., in Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, 493).

Although executors (and trustees) cannot appeal, except at their own risk (Lewin on Trusts, 8th Ed., 350), there is nothing in their position as such, to entitle them to any special consideration under cl. 2, sec. 5. (Thucker *v.* Canji, I. L. R., 14 Bom., 365, 369).

It is difficult and undesirable to attempt to define precisely the meaning of the words "sufficient cause" or "sufficient reason." To do so would be to crystallize into a rigid definition that judicial power and discretion which the Legislature has for the best of all reasons left undetermined and unfettered. (See *In re* Manchester E. B. Society, 24 Ch. D., 488). But the words "sufficient cause" in sec. 5 should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bonâ fides* is imputable to the appellant or the applicant for review. (Krishna *v.* Chathappan, I. L. R., 13 Mad., 269).

If an applicant for review or his pleader chose to dispute with the officer of the Court, who was right, as to the quantum of court-fee required for the application, that would not be "sufficient cause" for not making the application within the 90 days prescribed by the Limitation Act. (Munro *v.* Cawnpore Municipality, I. L. R., 12 All., 57). The Court cannot, however, extend the period merely out of benevolence to the party seeking relief (Carter *v.* Stubbs, 50 L. J., C. L., 4; Rivaz, 3rd Ed., p. 28). Counsel's laches is not a "sufficient cause." If applicant or his counsel could by the exercise of due diligence discover his mistake earlier, such mistake would not be a "sufficient cause." (See Gopal *v.* Solomon, I. L. R., 13 Calc., 62).

The fact that the respondent was prevented from urging his cross-objections owing to the appellant's withdrawing his appeal, is not a sufficient ground for admitting a substantive cross-appeal after the ordinary time. (Surbhai *v.* Raghoonathji, 10 Bom., 397; Chudasama *v.* Mahant, I. L. R., 16 Bom., 249).

The necessity of the Local Government to communicate with the legal adviser of the Government of India and of the Secretary of State,

and the fact that a necessary telegraphic communication was delayed on the road for ten days, were considered sufficient causes for the delay of twelve days on the part of the Secretary of State to prefer an appeal to the High Court from a decree of the Recorder of Moulmein. (Secretary of State *v.* Mootoosamy, 13 W. R., 245). Appeal by Government.

Before Act IX of 1871 came into operation, it was held, in the case of a party who presented an application for review of judgment within the ordinary period limited for appealing, that the time occupied by the Court in disposing of such application was not to be reckoned among the number of days limited for appealing, but was to be added thereto. In other words, the time during which an application for review was pending was not to be taken into account within the 30 or 90 days allowed for appeal. (Brojendro, Petitioner, 7 W. R., 529, F. B.; Poresh *v.* Gopal, 15 W. R., 61). After Act IX of 1871 came into operation, it was held that an application for review, if made within a reasonable time, and prosecuted with due diligence, was a sufficient cause for the applicant's not presenting his appeal within the prescribed period, if he preferred his appeal as speedily as might be after the termination of proceedings consequent on the application for review (Kuller *v.* Jewan, 22 W. R., 79). In Vasudeb *v.* Chinnasami, I. L. R., 7 Mad., 584, it has been held by the Madras High Court that, as sec. 12 or any other section of the Limitation Act does not expressly provide for the exclusion of the period of the pendency of an application for review, the time during which an application for review of judgment is pending cannot be excluded as a matter of right; but if the lower Appellate Court does allow the exclusion, the High Court cannot interfere on revision, under sec. 622, Civ. Pro. Code. An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred. Where it appeared that the application for review proceeded on grounds dealt with in the judgment sought to be reviewed, and, on the discovery of fresh evidence which was made nearly three months before the application, the Court declined to exercise its discretionary power to exclude the time so occupied. (Govinda *v.* Bhandari, I. L. R., 14 Mad., 81). In Ahsanullah *v.* The Collector, I. L. R., 15 Calc., 242, it has been held by the Calcutta High Court that the mere presentation of an application for review, where it is not shown that the grounds therefor are reasonable and proper, is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed. Where the appellant fails to show that he had reasonable grounds for asking for a review, the time taken in prosecuting the application for review cannot be deducted in calculating the period of limitation for the appeal. (Pundlik *v.* Achut, I. L. R., 18 Bom., 84). The mere pendency of an appeal (by another party) is not a sufficient cause for delay in applying for a review; nor is ignorance of the effect of a judgment a justification for such delay. (Golam *v.* Sayad, I. L. R., 8 Bom., 260, and the cases cited therein). Pendency of application for review or other proceedings. To be deducted only in certain cases.

The pendency of an application for revision under sec. 622 of the Civil Procedure Code, or of an appeal in a wrong Court under the circumstances contemplated in sec. 14, may be a sufficient cause of delay (Bulwant *v.* Gumani, I. L. R., 5 All., 591; Banee *v.* Haran, 24 W. R., 405, 406; Raghunath *v.* Nilu, I. L. R., 9 Bom., 452). Upon the analogy of sec. 14, the time occupied in actual proceedings in a suit to set aside an order in execution may be deducted in computing the delay that occurred before an appeal against that order is filed. (Sitaram *v.* Nimba, I. L. R., 12 Bom., 320). See notes to cl. 3, sec. 14, and I. L. R., 10 All., 524. Proceedings in wrong Court.

Order admitting appeal, or review, on insufficient cause when liable to be set aside.

An *ex parte* order admitting an appeal may be set aside at the hearing of the appeal if no sufficient cause for the delay can be shewn. (Secretary of State *v.* Mootooswamy, 13 W. R., 245; Dubay *v.* Ganeshi, I. L. R., 1 All., 34; Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 659; Venkatrayudu *v.* Nagadu, I. L. R., 9 Mad., 450). But if the appeal after its admission is transferred to an inferior Court (such as the Subordinate Judge's Court) for trial, such inferior Court cannot interfere with the order of admission (Jhotte *v.* Omesh, I. L. R., 5 Calc., 1). The High Court, however, on second appeal, may set aside the order. (Chunder *v.* Boshoon, I. L. R., 8 Calc., 251). The Bombay High Court refuse to follow the Calcutta ruling and hold that such inferior Court has the power to consider whether the delay has been accounted for. (Mulna *v.* Krishnajee, I. L. R., 14 Bom., 594, 596). Exercising an improper and unwarrantable discretion in admitting or refusing to admit an appeal may amount to such an irregularity in law as to constitute a ground of special or second appeal. (I. L. R., 8 Calc., 251; Hurro Chunder *v.* Surnomoyee, I. L. R., 13 Calc., 266; Rughunath *v.* Nilu, I. L. R., 9 Bom., 452; Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at pp. 485, 492, F. B.; *contra*, Rajcoomar *v.* Sheikh, 7 W. R., 337. Cf. I. L. R., 7 Mad., 584). An order admitting a *review* after the prescribed period, without any sufficient cause, may also be set aside on appeal (Luchman *v.* Tirbani, 14 B. L. R., 373, P. C.) But where the District Court, after proper inquiry and due consideration, has exercised his discretion in a reasonable manner, the High Court will not interfere with the conclusions arrived at, even though it would itself have arrived at a different conclusion (Ranchodji *v.* Lallu, I. L. R., 6 Bom., 304; Fatima *v.* Hansi, I. L. R., 9 All., 244). The High Court would interfere where the Court below had exercised no discretion at all, or had no legal evidence before it on which it could act, or where it had obviously exercised its discretion in a perverse and improper manner. (*Ibid.*, Bom., p. 308. See also *ex parte Retso*, decided by the Appeal Court in England on the 25th of January 1893).

See Table of Exceptions at p. 247*a* and pp. 183, 184 (notes), and p. 248, *supra*.

Sec. 5 when applicable.

Sec. 5 of the Limitation Act cannot be applied in making the computation of time provided for by sec. 12, and does not become applicable until *after* such computation has been made. In computing the time requisite for obtaining copies, no allowance can be made for delay caused by inability by reason of poverty to pay the estimated cost for copies. But if the stamps are not procurable, or the office is not open to receive payment of the estimated cost, allowance may be made for delay so caused. These and *similar* causes of delay may be considered under sec. 5, *after* the computation has been made under the other sections. (Bechi *v.* Ahsanullah, I. L. R., 12 All., F. B., 461)].

Sec. 5A.

5A. Whenever it is shewn to the satisfaction of the Court, that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application, owing to the appellant or applicant having been misled by any order, or practice or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall for all purposes be declared by all Courts to have been presented within the period of limitation prescribed therefor.

[This section has been added by Act VI of 1892, and its provisions apply to every appeal and review of judgment *heard* after the 29th July 1892, when the Act was passed.

Sec. 5A applies if the Court is satisfied that the appellant or applicant was misled, and that it was solely owing to his being misled that the appeal or application was out of time. The appellant or applicant need not shew that he was still misled at the moment that he presented the appeal or application. The misleading order, practice or judgment does not cease to be an excuse from the moment that it is overruled—for a man ought to have reasonable time to become acquainted with the new decision and to conform himself to it. (See Proceedings of the Legislative Council, 30th July 1893). For the main object of the introduction of sec. 5A, see notes under sec. 12, cl. 2].

Sec. 6. Special and local laws of limitation.

6. When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed.

[Cf. sec. 6, Act IX of 1871. Sec. 3 of Act XIV of 1859 partially corresponded to this section.

For a full commentary on this section, see pp. 216-219, 234, and 236, *supra*.

Code of Civil Procedure—a *general* law.

The Code of Civil Procedure is neither a *special* nor a *local* law. An application under sec. 230 of the Code of Civil Procedure if made on the day the Court re-opens after a holiday is therefore entitled to the benefit of the rule laid down in sec. 5 of the Limitation Act. (Peary Mohun *v.* Anunda, I. L. R., 18 Calc., 631, 634). The Code of Civil Procedure is as *general* as the Indian Limitation Act. The *general* provisions of the latter Act modify the limitation clauses of the former. (Musst. Phoolbas Koer *v.* Lalla Jogeshur, I. L. R., 1 Calc., 262, P. C., pp. 216, 217, *supra*). Sargent, C. J., and Birdwood, J., have gone further and applied the principle of sec. 7 of the Indian Limitation Act to applications under sec. 230, Act XIV of 1882, although sec. 7, by its wording is *not* a *general* provision. (Moro *v.* Visaji, I. L. R., 16 Bom., 536).

Difference between Act IX and Act XV.

In Act IX of 1871, the concluding words of sec. 6 were "nothing herein contained shall *affect such law*;" but in the present Act, the words are "nothing herein contained *shall affect or alter the period so prescribed.*" (See Behari *v.* Mungolanath, I. L. R., 5 Calc., 110; and I. L. R., 10 Mad., 210, at p. 211).

General provisions and exceptions of Act XV applied to periods prescribed by *other* laws.

It has accordingly been held that the general provisions and exceptions contained in Parts II and III of Act XV of 1877 are applicable to suits, appeals or applications for which periods of limitation are specially prescribed by special or local laws. (See Khetter *v.* Dinabashy, I. L. R., 10 Calc., 265; Kullayappa *v.* Lakshmipathi, I. L. R., 12 Mad., 467, at p. 471; Girija *v.* Ramnarain, I. L. R., 20 Calc., 264, and pp. 217, 219, *supra*). The provisions of secs. 5, 12, 14, 18, and 19, which do not expressly refer to the second schedule of Act XV of 1877, have actually been applied to cases for which periods of limitation are prescribed by laws other than the Limitation Act itself. (See note, p. 219, *supra*). But the provisions of secs. 4 and 7, which expressly refer to the second schedule of the Limitation Act, cannot, it is apprehended, be extended to cases for which special periods of limitation are prescribed by any enactment other than the second schedule of Act XV of 1877. (See Girija *v.* Patani, I. L. R., 17 Calc., 263, 267, and pp. 217, 218, *supra*). Sec. 184, Act VIII of 1885, expressly enacts a provision similar to that of sec. 4, for certain suits between landlord and tenant; and sec. 185, Act VIII of 1885, enacts that secs. 7, 8, and 9 of Act XV of 1877, shall not apply to suits and applications specified in the third schedule of the former Act, but that other general provisions of Act XV shall apply to them.

Instances of special or local laws.

For the special periods of limitation prescribed by the Bengal Rent Act, see Appendix, pp. 519-524, *supra*, and the following sections of Act VIII of 1885; sec. 45 (six months—ejectment after expiry of term of non-occupancy ryots); sec. 46 (three months—ejectment of such ryots for refusal to pay enhanced rents); sec. 58 (three months—for penalty for withholding receipt); sec. 75 (six months—for penalty for exaction); sec. 80 (twelve months—for application for registration of landlord's improvement); sec. 87 (two years—to recover occupancy of holding alleged to have been abandoned); *ibid.* (six months—similar suit by non-occupancy ryots); and sec. 149 (three months). The suits and applications mentioned in these sections are not governed by secs. 184 and 185 of Act VIII of 1885.

Sec. 14 of Act XIX of 1841 prescribes a period of six months for an application to the Judge for the protection of property against wrongful possession in cases of succession.

For the thirty days' limitation to suits for obtaining orders for the registration of documents under sec. 77, Act III of 1877, see I. L. R., 10 Calc., 265.

For the two months' limitation under cl. 5, sec. 17 of the Putnee Regulation VIII of 1819, see Surnomoyee *v.* Land Mortgage Bank, 8 C. L. R., 341; and Judoonath *v.* Nobokristo, 3 W. R., S. C. Ct. Ref., 2. For the three months' limitation under sec. 87, Act III of 1864 (B. C.), corresponding to sec. 374 of the Bengal Municipal Consolidation Act of 1876, see Chunder *v.* Obhoy, I. L. R., 6 Calc., 8, F. B. For the one year's limitation to suits to set aside certificates under the Public Demands Recovery Act, VII of 1886 (B. C.), see Girija *v.* Ramnarain, I. L. R., 20 Calc., 264. For the six months' limitation under sec. 195, Criminal Procedure Code, 1882, see p. 29 (note), *supra*. For some other provisions of limitation relating to criminal cases, see sec. 11, Indian Salt Act, XII of 1882; sec. 72, Bengal Excise Act, VII of 1878; sec. 48, Indian Marine Act, XIV of 1887; sec 419, Calcutta Municipality Act, II of 1888; and Stokes' Anglo-Indian Codes, Vol. II, pp. 15 and 16.

For other instances of special periods of limitation for suits, appeals and applications, see Stokes' Anglo-Indian Codes, Vol. II, pp. 951-954, Agnew's Index to the Statutes, Acts and Regulations, and the Index to Phillip's Revenue and Collectorate Law. For a few instances of special periods of limitation, see the following special and local Acts and Regulations: Act IX of 1859, sec. 20, and 21 W. R., 318 (Claims to Property seized as forfeited); Act V of 1861, sec. 42 (Police); Act XXIII of 1863, sec. 18 (Claims to Waste Lands); Act X of 1870, sec. 58 (Land Acquisition); Act VII of 1878, sec. 47 (Forests); Beng. Act I of 1879, sec. 44 (Chutia Nagpur, Landlord and Tenant); Reg. III of 1872, sec. 25, and I. L. R., 13 Calc., 245 (Sonthal Pergunnahs Settlement); Beng. Reg. II of 1819, sec. 24 (Resumption of Revenue); Beng. Reg. VII of 1822, sec. 20 (Settlement); Act XXXII of 1855, sec. 7 (Embankments); Beng. Act I of 1879, secs. 42, 45, 87, 121, 122, 126 (Landlord and Tenant, Chutia Nagpur); Beng. Act VIII of 1879, sec. 10 (Record of Rent, Settlement); Beng. Act VII of 1864, sec. 10 (Salt); Beng. Act IV of 1866, sec. 99 (Calcutta Police); Beng. Act V of 1874, sec. 87 (Calcutta Port Improvement); Beng. Act IV of 1871, sec. 36 (Sanitation of Puri); Beng. Act IX of 1871, sec. 17 (Hugli Bridge); Beng. Act III of 1884, sec. 363 (Mufassal Municipalities); and Beng. Act II of 1888, sec. 427 (Calcutta Municipality). As to sec. 357 of Beng. Act IV of 1876 corresponding to sec. 427, Act II of 1888, see Dwarka *v.* The Corporation of Calcutta, I. L. R., 18 Calc., 91].

7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed. Sec. 7. Legal disability.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed. Double and successive disabilities.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply. Disability of representative.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

[This section corresponds to secs. 11 and 12 of Act XIV of 1859, and sec. 7, Act IX of 1871.

For a full commentary on sec. 7, see Lecture IX and pp. 260-268, *supra*.

"If a *person* entitled to institute a suit or make an application." According to the General Clauses Act, I of 1868, words in the singular include the plural, and the word "person" includes a body of individuals whether incorporated or not. (See p. 205, *supra*). The first line of sec. 7 must therefore be read thus: "If a person or *persons* entitled to institute a suit or make an application," &c. The words "he may institute the suit or make the application" in line 4 of sec. 7 must also be read as "he *or they* may institute the suit or make the application." The grammatical meaning of the words of sec. 7 makes it applicable to the case of the person or persons (all of them) entitled to sue or make an application, being under a legal disability, *i.e.*, to the case where there is either one plaintiff or applicant, and he is a minor, or insane, or an idiot, or in which there are several plaintiffs or applicants, and they *all* labour under some disability or other. (See Perry *v.* Jackson, 4 T. R., 519; Seshan *v.* Rajagopala, I. L. R., 13 Mad., 236; Vigneswara *v.* Bapayya, I. L. R., 16 Mad., 436). It is evident, however, that except in the case of minor twin brothers, the disability of each of several plaintiffs or applicants cannot, generally speaking, cease at one and the same date. But will each of such plaintiffs or applicants have a *separate* statutable cause of action or starting point of limitation from which the prescribed period is to be Disability of the person or persons entitled. Disability of persons who are *not* twin brothers.

When may *each* of several "persons entitled" claim the benefit of sec. 7.

computed? This question, it is apprehended, should be answered in the affirmative, if the several persons are *not joint* creditors or claimants. Indeed in the case of persons who are *not joint claimants*, if one or some only labour under some disability or other, there is nothing in sec. 7 or sec. 8 which disentitles him or them to the privilege given by the law whatever may happen to the others not under disability. In such a case, each of the minor or insane claimants may *separately* institute a suit or make an application, and the language of sec. 7, as it stands, may be applicable to each without any difficulty. It has been held in America that if *some* of several coparceners or tenants in *common* are under a disability, their rights are saved by the exception, but *their* disability does not preserve the title of the *others* who are under no disability. In the case of a *joint* tenancy, or where the parties are entitled to a joint action, the rule is different. (See Buswell, pp. 182, 183). It was held by the Calcutta Sudder Dewany Adwalat that if *one* of two co-sharers of a taluk was a minor, that would excuse *his* delay in suing in respect of such taluk. (Bolakee *v.* Lukheemonee, Reports for 1850, p. 349). Under Act XV of 1877, if the minor is a *joint* claimant, and the major claimant *can* (by reason of his being a co-partner, a co-executor or on any other ground) give a full discharge without the concurrence of the minor or his guardian, the minor as well as the major co-sharer is debarred from taking advantage of the exemption granted by sec. 7. (See sec. 8).

Distinction between tenants in common, and joint tenants.

Minors having guardians may claim benefit of sec. 7.

The benefit of sec. 7 is *not* limited to the period when the disability has *ceased*, but applies also to the period during which the disability continues. Persons under disability are *not forbidden* to sue or apply (by their next friends) *before* the cessation of disability; their next friends may sue or apply at any time during the continuance of the disability, whether the *ordinary* period of limitation has already expired or not. (Musst. Phoolbas *v.* Lalla Jogeshur, I. L. R., 1 Calc., 226, P. C.) Sec. 7 applies to every minor whether he has a guardian or not. (Agar Sing *v.* Lakhi, 2 Central Prov. Law Rep., 184).

Sec. 7 applies to all applications mentioned in Sched. II.

The section applies to *all applications mentioned* in the tricolumnar schedule of Act XV of 1877, and to all such suits, except suits to enforce rights of *pre-emption*. Upon a strict construction of sec. 7 it is inapplicable to suits for which a period of limitation is prescribed by any Act, other than Act XV of 1877. (Girija *v.* Patni, I. L. R., 17 Calc., 263, 267). It is expressly enacted by sec. 185 of Act VIII of 1885 that sec. 7 of Act XV of 1877 shall not apply to suits and applications mentioned in the third schedule of the Bengal Tenancy Act.

Section does not apply to appeals.

The section does not extend the periods prescribed for preferring an appeal. Sec. 7 refers only to suits and applications and makes no mention of appeals. The provisions of sec. 7 are therefore unavailable to minor or insane *appellants*. (See Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at p. 480). It has been said that it would be productive of the greatest inconvenience to apply its provisions to applications for reviews of judgments and other applications made in the *course* of suits or proceedings. (See note 9, p. 278, *supra*; Rama Raw *v.* Venkatesa, I. L. R., 5 Mad., 171, F. B.) But the policy of the law is not to discourage such exceptions (L. R., 17 Eq., 74; and Banning, 81), and the Court is bound to give full effect to the language of the exception. (Mahomed *v.* Clara, 2 N. W. P., 173). It has accordingly been held that an application to set aside a sale (Baldeo *v.* Kishen, I. L. R., 9 All., 411) and an application for leave to appeal to Her Majesty in Council (*In re* Sita Ram Kesho, I. L. R., 15 All., 14, at p. 17) being applications, the periods of limitation prescribed by arts. 166 and 177 may be extended under the provisions of sec. 7.

Does apply to applications for leave to appeal.

Sec. 7 has, without any hesitation, been applied to applications for execution. A plaintiff who has obtained a decree during his minority has the option either of applying through his guardian to execute the decree during his minority, or to wait until the expiration of his minority before executing his decree. His disability does not cease, because he, through his guardian, makes two or more applications for execution, however long the interval between them, provided they are all made during his minority (Monmohun *v.* Gunga, I. L. R., 9 Calc., 181). See also Jagjivan *v.* Hussan, I. L. R., 7 Bom., 179; Anantharama Ayyar *v.* Karupanan, I. L. R., 4 Mad., 119; and pp. 262, 264, *supra*. Art. 179, relating to applications for the execution of decrees, provides six several points of time from which the period of three years shall begin to run, and for the purposes of the Limitation Act the period which begins from each point is a separate period, and if the person entitled is under a disability at the time when *any one* of such period commences, the operation of the Act is suspended during the continuance of the disability by the operation of section 7 (Lolit *v.* Janoki, I. L. R., 20 Calc., 714). In this case A obtained a decree in 1881 and made several applications for executions. After the death of A his heirs who were minors made another application for execution through their guardian in 1889. No further steps were taken during the next three years, but in 1892 or 1893 the minors through their guardian again applied for execution, and it was held that the application was saved from the operation of Limitation by the provisions of section 7.

Sec. 7 applies to applications for execution.

Art. 179 prescribes 6 several starting points.

It is apprehended that, as sec. 7 of Act IX of 1871 did not apply to applications, a minor who obtained a decree before the 1st October 1874, in a suit instituted after the 1st April 1873, was bound to make his first application for execution within the three years allowed by art. 167 of that Act. His second application, if made after 1st October 1877, would be governed by the provisions of Act XV. (See pp. 203 (note), 213, *supra*.

Applications under Act IX of '71.

As to the execution of decrees obtained by minors in suits instituted when Act XIV of 1859 was in force, see Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748, and note 7, p. 260, *supra*.

Under Act XIV of '59.

If a minor who has obtained a decree does make an application for execution, and such application is granted under sec. 230 of the Civil Procedure Code, his subsequent applications will be governed by the twelve years' rule laid down in that section. This period of 12 years, prescribed as it is by the *general* Code of Civil Procedure, might be extended by the provisions of sec. 7 of the *general* law of limitation, if there was nothing in the language of sec. 7 to restrict its operation to periods of limitation prescribed by the second schedule of Act XV itself. (See Musst. Phoolbas Koer *v.* Lalla Jogeshur, I. L. R., 1 Calc., 226). In Moro *v.* Raghunath, I. L. R., 16 Bom., 536, the Bombay High Court have held that the period of 12 years prescribed by sec. 230 of the Civil Procedure Code may be extended by "the general principle of law," that time does not run against a minor. But it is clear, that independently of sec. 7, there is no such equity or general principle of law. (See 17 Vesey, 87, at p. 92). In Lolit *v.* Janoki, I. L. R., 20 Calc., 714, the Calcutta High Court *assume* that sec. 7 of Act XV of 1877 is applicable to the 12 years' period of limitation prescribed by sec. 230 of the Civil Procedure Code, and observe that such period cannot (as provided by the section) be extended, if the disability arises subsequently to the date (of the decree) from which the period is to be reckoned. It has, on the other hand, been held that sec. 7 is inapplicable to suits for arrears of rent under Bengal Act VIII of 1869. (Girja *v.* Patani, I. L. R., 17 Calc., 263).

May sec. 7 extend the 12 years' period prescribed by sec. 230, Civ. P. Code.

Disability at the starting point of limitation.

The plaintiff or applicant must be under a disability at the date from which the period of limitation is to be reckoned. (See pp. 260, 261, *supra*). As to the effect of a written acknowledgment given to a minor against whose predecessor time has already commenced to run, see notes under sec. 19, and Venkata *v.* Kothanda, I. L. R., 13 Mad., 135. The cessation of disability, or death under disability, constitutes a statutable cause of action. (See pp. 261, 262, *supra*). As to when the legal representatives of minors and lunatics are entitled to the privilege conferred by this section, see pp. 265, 266, *supra*. A legal representative of a person who had during his lifetime ceased to be under a disability, is not entitled to the privilege.

Representatives of minors, &c.

Assigns of minors cannot claim benefit of sec. 7.

It is laid down, as a general rule, that infancy is a *personal* privilege, of which no one can take advantage but the infant himself. (Behari *v.* Beni, I. L. R., 3 All., 408, 412). Assignees of infants are not entitled to the privilege. (Rudrakant *v.* Nobokishore, I. L. R., 9 Calc., 663, F. B. ; pp. 263, 264, *supra*). Under the *express* provisions of paragraph 3, sec. 7, the legal representatives of an infant claimant when the latter dies an infant, are entitled to sue or apply within the same period after the death as would otherwise have been allowed from the ordinary starting point of limitation.

Minors, &c., *not bound* to invoke sec. 7.

The law allows the maximum period of three years from the statutable cause of action, or the full period from the ordinary starting point of limitation, whichever is more advantageous to the plaintiff. (See pp. 248, 265-67, *supra*). Thus it has been held that sec. 7 was never intended to place minors under a special disability as compared to majors ; but to make a special *concession* in their favor. A man who comes into Court after attaining his majority, if he is within the ordinary time of limitation provided by Schedule II of Act XV, is not bound to invoke sec. 7. Section 7 is an additional or supplementary provision, giving minors liberty to take a fresh start for computation from the time of attaining majority, provided that the privilege so accorded is limited to three years. If the ordinary period of limitation, computing from the original cause of action, expire during plaintiff's minority, or has, at the date of his attaining majority, less than three years to run, he will have full three years, but where that is not so, he has (in a suit for land) the ordinary twelve years from the *original* cause of action. (Bissumbhur *v.* Soorodhuny, 3 W. R., 21, at p. 22. See also illustration (*e*) and the note under it).

Indian Majority Act as amended in 1890.

As to when a minor attains majority, see pp. 252, 254, *supra*. The Indian Majority Act, sec. 3, paragraph 1, as amended by sec. 52 of Act VIII of 1890, enacts : Every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall be deemed to have attained his majority when he shall have completed his age of twenty-one years, and not before.

Rulings before the amendment.

When a Court to which application has been made under sec. 3 of Act XL of 1858 for a certificate has adjudged the applicant entitled to have one, he then substantially obtains it ; although it may not be drawn up or issued at the time. Having obtained such an order, he has in substance complied with the terms of the Act ; in the same way as, when a plaintiff has judgment that he shall have a decree in his suit, it may be said that he has then obtained his decree. The decree or the certificate when it is drawn up afterwards, relates back to the time of the order. Therefore, where a minor had been

represented in a suit by a person who had obtained an order for a certificate under sec. 3, but had not had it issued to him, the absence of a certificate was held to be not such an irregularity as entitled the minor, on coming of age, to have the proceedings set aside on the ground that he had not been properly represented. (Mungniram Marwari *v.* Gursahai Nand; Liakat Hossein *v.* Gursahai Nand, I. L. R., 17 Calc., 347, P. C.) This case overrules Stephen *v.* Stephen, I. L. R., 9 Calc., 901. Besides, under the Guardians and Wards Act, VIII of 1890, it is now not at all necessary to take out a certificate of administration or pay any fee for it. (See section 2). The appointment or declaration by the Court before the minor attains the age of eighteen years, raises the age of majority to 21 years. (See Girish *v.* Abdul, I. L. R., 14 Calc., 55; Yeknath *v.* Waruba, I. L. R., 13 Bom., 276, and section 52, Act VIII of 1890). The new Act also adopts the ruling in Periyasami *v.* Seshadri, I. L. R., 3 Mad., 11, and lays down that the age of majority is 21 years if the superintendence of the minor's property is once assumed by any Court of Wards before he attains the age of 18 years.

Rulings under the Majority Act and how they have been modified since 1890.

In a suit to recover money due upon certain promissory notes executed between the 14th December 1885 and the 16th March 1886, the defendant pleaded (*inter alia*) minority, and alleged that by an order of the Civil Court the Collector had been appointed his guardian and manager of his estate under Act XL of 1858; that on the 6th December 1885 his estate had been released by the Court of Wards and was made over to his father on the 17th December; that on the 30th December when he was 19 years old, the District Judge holding that he was a minor appointed a manager of his estate: it was held that there was no evidence that a guardian of the person or property of the defendant had ever been appointed within the meaning of sec. 3 of the Indian Majority Act (IX of 1875), and as the defendant was not under the jurisdiction of the Court of Wards at the time of the execution of the promissory notes, he was then no longer a minor, but *sui juris* and competent to enter into a binding contract. It was also held that the Collector is not a Court of Justice within the meaning of sec. 3 of the Majority Act. A manager or guardian appointed by the Collector under sec. 12 of Act XL of 1858 is not a guardian appointed by a Court of Justice. A Collector appointed by the Judge, under section 12 of Act XL of 1858, to take charge of the minor's estate cannot properly be styled the guardian of a minor's property. It was further held that under sec. 3 of the Majority Act the disability of minority only continues so long as the Court of Wards retains charge of a minor's property, and no longer. Rudra Prokash Misser *v.* Bhola Nath Mukherji, I. L. R., 12 Calc., 612, referred to and commented on. (Birjmohun Lall *v.* Rudra Prokash Misser, I. L. R., 17 Calc., 944).

But sec. 52, Act VIII of 1890, has now modified the law. When any *Court of Wards* has once assumed superintendence of the minor's property before the minor has attained the age of 18 years, the disability of infancy will last till the age of 21, whether the Court of Wards continues to act or not. So, even under the old law when a guardian had been once appointed or declared by any Court of Justice before the minor had attained the age of 18 years, the disability would last till the age of 21, whether the original guardian continued to act or not. (See Rudra *v.* Bhola, I. L. R., 12 Calc., 612).

Partial insanity.

As to what is insanity, see p. 255, *supra*. As to how far partial insanity or lucid intervals may affect civil rights, see pp. 256, 257, *supra*.

"After," same as "from."

The words "within three years after the disability has ceased" are equivalent to "within three years from the cessation of disability" (see note 3, p. 239, *supra*, and Dunne *v.* Shoshi, Second Appeal No. 1872 of 1887, decided by Wilson and Rampini, JJ., on the 31st July 1888). The date of the cessation or the date of the death is excluded in computing the three years. (Juggomohun *v.* Luchmeshur, I. L. R., 10 Calc., 748, at p. 751). As to how the age of majority is *computed*, see note 8, p. 254, *supra*].

Computation of age.

Illustrations.

Sec. 7, Illustrations.

(*a*). The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

[The plaintiff here gets an *extension* of four years. He may bring his suit within seven years from the date when the right to sue accrued. See art. 50, sched. II, which prescribes a period of three years].

(*b*). A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority within which he may bring his suit.

[See art. 123. The plaintiff here gets *altogether* a period of fourteen, instead of twelve years, to bring his suit].

(*c*). A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

[This is an instance of double and successive disabilities. The second disability supervenes before the first disability has ceased. It is a case of successive disabilities in the *same* person].

(*d*). A right to sue accrues to X during his minority. X dies before attaining majority and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

[This is a case of successive disabilities in *different* persons—the minority of the legal representative at the time of the death of his minor predecessor].

(*e*). A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accruer A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under this section.

[Here the plaintiff gets no extension of time, although he is insane during a part of the period of limitation. But he is not obliged to avail himself of the provisions of sec. 7. He need not sue within three years after the cessation of his disability. He may institute his suit within the ordinary period (twelve years) from the time when the right to sue accrued. See art. 124, and pp. 249, 266, 267, *supra*].

(*f*). A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accruer, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

[See art. 139, which prescribes a period of twelve years. If A's representative in interest, upon whom the representation devolves on A's death, is at that time himself under disability, the principle of illustration (*d*) will apply. See the note to illus. (*e*)].

Sec. 8. Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

Illustrations.

Illustrations.

(*a*). A incurs a debt to a firm of which B, C and D are partners. B is insane and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(*b*). A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

[Both (*a*) and (*b*) illustrate the *first* part of sec. 8.

Sec. 7 may apply to each of several tenants in *common*.

Sec. 8 bears to sec. 7 a relation which is somewhat similar to that which sec. 21 bears to secs. 19 and 20. Grammatically speaking, the words of sec. 7 extend to "cases where the person individually a single plaintiff, or persons in the plural, when there are several plaintiffs," are under a disability. Where the person entitled to sue or to apply is a body of individuals, they must all labour under a disability before the provisions of sec. 7 can grammatically apply to them. (See Seshan *v.* Rajagopala, I. L. R., 13 Mad., 236; Vigneswara *v.* Bappayya, I. L. R., 16 Mad., 436). Where each of a body of individuals entitled to sue or apply is entitled to sue or apply for his share or for the whole without being obliged to join the others, each may take advantage of the provisions of sec. 7, provided he was a minor, or insane or an idiot at the time from which the period of limitation is to be reckoned. A minor creditor or claimant, in such a case, is entitled to the benefit of the provisions of sec. 7 whatever may happen to the others who are not minors or are not under any other disability. See Anando *v.* Anando, I. L. R., 14 Calc., 50, where one of two joint decreeholders being a minor, his application was held (under sec. 7) to be not barred by limitation, though his co-decreeholder's remedy was barred under the general law. This decision has, however, been dissented from in Madras. (See Vigneswara *v.* Bappayya, I. L. R., 16 Mad., 436, at p. 439).

Sec. 8 applies to *joint* claimants only.

Sec. 8 provides *only* for cases where the claim of the several persons who are entitled to sue or apply is a *joint* claim, and it lays down when the disability of one of these joint claimants shall or shall not entitle any of them to the exemption to which the former, if he were a sole plaintiff or sole applicant, would be entitled. The first part of sec. 8 enacts that when a full discharge of the whole debt or claim *can* be given by any of the claimants without the concurrence of the claimant who is labouring under a disability, *none* of the joint claimants shall be entitled to the exemption granted by sec. 7. The second part of sec. 8 enacts that when one of several joint claimants is under a disability, and when a full discharge of the whole debt or claim *cannot* be given by any of the others without the concurrence of the first, *viz.*, (the claimant who is labouring under a disability), the exemption granted by sec. 7 shall be enjoyed by *all* the joint claimants until one of them acquires

Two parts of sec. 8, and two classes of joint claimants.

the legal capacity to give a full discharge without the concurrence of the others. The second part of sec. 8 thus extends the provisions of sec. 7 to some of the cases in which one of the joint claimants is under a disability. But it has been held that the latter part of sec. 8 applies only to a case of all the joint creditors or claimants being under a legal disability. (Anando *v.* Anando, I. L. R., 14 Calc., 50, 53; Vigneswara *v.* Bapayya, I. L. R., 16 Mad., 436). The correctness of these rulings has been questioned. (See note 7, p. 271, *supra*; 4 Mad. Law Journal, 50). The expression "one of the joint claimants" means one or more of the joint claimants not being all, *i.e.*, *some only* of the joint tenants.

Rulings on the 2nd part of sec. 8.

Sec. 8 explained.

When the legal relation of the joint creditors or claimants to each other is such that one or some of them (if free from disability) *can* give a full discharge of the whole debt or claim without the concurrence of the others (whether all or some of these others are labouring under or are free from disability) time will run against *all* the creditors or claimants; and the minority, insanity or idiocy of *any* of such creditors or claimants shall not entitle him or his co-plaintiffs to any extension of time under sec. 7. The illustrations to sec. 8 show that the relation of co-partners to each other is such that one partner *may* be entitled to give a discharge of debts due to all the partners. When the legal relation of the joint creditors or claimants to each other is such that one or some of them *cannot* give a full discharge of the whole debt or claim without the concurrence of the others, the minority, insanity or idiocy of *any* of such creditors will entitle *all* of them to an extension of time under sec. 7. In this second class of cases time will not run as against any of the joint creditors or claimants "until they all are free from disability." (See the latter part of sec. 8, Act IX of 1871). The language of the latter part of sec. 8, Act XV of 1877, supposes the possibility of any of the joint creditors or claimants (whether he is free from disability or not) subsequently acquiring the legal capacity and power to discharge a debt or claim on behalf of all of them; and it provides that if one of the joint creditors or claimants subsequently becomes capable of giving a full discharge without the concurrence of the others, time will begin to run against *all* the joint creditors or claimants although one or some of them be still labouring under a disability.

Discharge by one of several joint claimants, at common law, and in equity.

A release or discharge by some of several joint decreeholders without the concurrence of the others is not a sufficient discharge (I. L. R., 4 Calc., 350, at p. 353). No act of one or more of a number of joint decreeholders can *per se* amount to a valid discharge of the decree within the meaning of sec. 8 (I. L. R., 13 Mad., 236, at p. 240). Without considering the applicability of the latter part of sec. 8, it has been held in Madras that sec. 8 does not apply to joint decreeholders. (*Ibid.*) But see pp. 269-271, *supra*. A release by one of several joint promisees at common law, discharges the debt as against all. (Wallace *v.* Kelsall, 7 M. and W., 264; Ahamudin *v.* Grish, I. L. R., 4 Calc., 350). But in cases of money lent, joint creditors are, in *equity*, treated as tenants in common, and accord and satisfaction with one of two joint creditors is good only as regards *his* claim. (Steeds *v.* Steeds, 22 Q. B. D., 537). Where trust money is lent by two or more trustees, the interest of the trustees not being apportionable, they are treated as joint tenants even in equity. (*Ibid.*) As a rule, one of two holders of a joint right cannot, in equity, and, therefore, in substance, give a full discharge without the concurrence of the other, unless they are both partners, executors, or members of a Mitakshara joint family. See pp. 271, 272, *supra*. No valid discharge can be given by one of two persons against whom a tort has been committed. (Anando *v.* Anando, I. L. R., 14 Calc., 50, 54).

Partners, executors and members of Mitakshara joint family may discharge.

Even a member of a Mitakshara joint Hindu family if his name does not appear in the bond executed in favor of another member of the family, and on which the suit is brought, is not a joint creditor within the meaning of sec. 8. (Yeknath *v.* Waman, I. L. R., 10 Bom., 241)]. Power of a member of a joint-family.

It has been held that a member of a Mitakshara joint family may discharge a joint claim without the concurrence of the other members. (Surju *v.* Khawahish, I. L. R., 4 All., 512; Vigneswara *v.* Bapayya, I. L. R., 16 Mad., 436, 440). In the latter case it was held that a joint claim to set aside an execution sale of ancestral property might be so discharged. But the correctness of this decision has been questioned. (See 4 Mad. L. J., p. 55).

For additional notes on sec. 8, see pp. 268, 272, *supra*].

9. When once time has begun to run, no subsequent disability or inability to sue stops it: Sec. 9. Continuous running of time.

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues. Proviso.

[The concluding portion of sec. 11, Act XIV of 1859, partially corresponded to this section. Cf. sec. 9, Act IX of 1871. For a full commentary on sec. 9, see pp. 240-245, *supra*.

Where time has begun to run, owing to the right to sue having accrued to a person not labouring under any legal disability, the subsequent disability of his son or other representative is not a ground of exemption from the operation of the ordinary rule. (Mohabut *v.* Ali, 12 W. R., 1; Siddhesshur *v.* Sham, 23 W. R., 285; Obhoya *v.* Hurry, 10 W. R., 285).

A disability or inability to sue, even at the time when the right to sue accrues, is not a ground of exemption, unless it is so provided by some section of this Act. (See pp. 240 *et seq.*, *supra*).

Time which has commenced to run from the ordinary starting point of limitation may cease to run at the date of an acknowledgment under sec. 19. But an acknowledgment cannot be treated as a subsequent "disability." (Venkataramayyar *v.* Kothandaramayar, I. L. R., 13 Mad., 135)]. As to the Proviso, see pp. 244, 245, *supra*.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time. Sec. 10. Suits against trustees (for a specific purpose) and their representatives.

[Section 2 of Act XIV of 1859 corresponded to this section. Cf. sec. 10, Act IX of 1871.

See pp. 146, 148, and 236, *supra*, sec. 3, and arts. 98, 100, 133, and 134.

The expression "trust for any specific purpose," is sufficiently definite. Even if the four latter words had been omitted, sec. 10 would have applied only to actual and direct trusts as between *cestui que* trusts and trustees properly so called. "When the Act speaks of one man being seised or possessed to the use of, or in *trust* for, another, I can hardly conceive that it means any other than an *actual direct* trust; not such possible, eventual, trust, as may, in case Actual direct trust.

Indirect and implied trusts.

certain facts are established in evidence, be declared by a Court of Equity against a person, who claims to be, and who *primâ facie* is the true owner of the estate. Questions of that kind almost always depend upon controverted facts; and, according to every principle upon which Statutes of Limitation are grounded, long possession ought to secure a party against the necessity of entering into such a controversy at a distance of time." (Beckford *v.* Ward, 17 Vesey, Junior, 87, at p. 96, P. C.) In the case of a trustee by *implication*, and as such affected by an equity, that equity must be pursued within some reasonable time. (*Ibid.*, p. 99*a*).

Act II of 1882.

A "trust," according to Act II of 1882, is an obligation annexed to the ownership of property, and arising out of a confidence reposed in, and accepted by, the owner (*i.e.*, the trustee), or declared and accepted by him, for the benefit of another (*i.e.*, the beneficiary or *cestui que trust*), or of another and the owner. A person legally appointed to succeed a discharged trustee is also a trustee.

"Trust" in Act XV, means trust *properly* so called.

A *quasi*-trust, or an obligation in the nature of a trust, is not a trust properly so called. A resulting trust, or a constructive trust, is only a *quasi*-trust. A precatory trust, according to Spence, is an express trust, and so long as the purpose of the trust is *specified*, or necessarily implied from the words used by the author of the trust, it is a trust within the meaning of sec. 10. Implied trusts, or trusts which the law would infer merely from the existence of particular facts or fiduciary relations, are not "trusts" within the meaning of this section. (Kherodemoney *v.* Doorgamoney, I. L. R., 4 Calc., 455).

An executor, a partner, an agent, a director of a company or a legal adviser has a *fiduciary* character, but none of these persons is *necessarily* a trustee in the strict sense of the word. (See I. L. R., 4 Calc., 455, 469). But the word "trustee" as defined in the English Trustee Act, 1888, includes an executor or administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds. (See *In re* Lands Allotment Company, 1894, 1 Ch., 616, 631).

Surviving partners.

The surviving partner of a firm is not a trustee for the representatives of the deceased partner. (Knox *v.* Gye, L. R., 5 H. L., 656, at p. 675). He may be called a trustee, so far as his obligations to such representatives extend, but when these obligations have been fulfilled or are discharged or terminate by law, the supposed trust is at an end. (*Ibid.*) Such obligations are liable to be barred by lapse of time. (*Ibid.*)

Directors of Companies.

As to what extent, if at all, a director of a joint stock company is a trustee of the company, within the meaning of sec. 10, see The New F. S. & W. Co. *v.* Kessowji, I. L. R., 9 Bom., 373, at pp. 393, 394, 399, 400. Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control. (Per Lindley, L. J., *In re* Lands Allotment Company, 1894, 1 Ch., 616, 631). In England the company's claim to recover funds which a director has misapplied by applying them to a purpose which was *ultra vires* is not barred by the Statute of Limitations. But directors there are precluded from pleading the bar of the statute by virtue either of a general rule of the Court of Equity applicable to *all* trustees and *quasi*-trustees, or else by the Judicature Act of 1873 which is applicable to all persons *holding* property upon an *express* trust. In British India, directors may plead limitation as the property of the Company is not *vested* in them. (Kathiawar *v.* Virchand, I. L. R., 18 Bom., at p. 130). Since 1890, even an *express* trustee, in England,

Trustee Act, 1888.

is *not* precluded from pleading limitation, unless the beneficiary can prove either (1) *fraud* or fraudulent breach of trust, or (2) that the trust property or its proceeds are still *retained* by the trustee, or (3) that such property or proceeds were received by the trustee and *converted to his use.* (Sec. 8, Trustee Act, 1888).

Agents when "trustees."

An agent whose duty it is to remit all monies received to the principal is not an express trustee. But if he is entrusted with funds for the purpose of purchasing lands or stock, or of being employed in any other *particular* manner, he is treated as an express trustee. (Bardick *v.* Garrick, L. R., 5 Ch., 243).

Depositees.

A deposit or a bailment does not create an express trust. (Banning, 187).

Executors when trustees.

As an executor, always takes the estate subject to the claim of creditors, a charge of debts generally in a will upon the testator's estate does not make the executor a trustee within the meaning of sec. 10; but where a particular property was given upon trust to pay a particular debt or debts, the executor having a new duty imposed upon him, the Calcutta High Court treated him as a trustee within the meaning of the section, so far as the particular property and the particular debts were concerned. (Anundo Moyee *v.* Grish Chunder, I. L. R., 7 Calc., 772; Greender *v.* Mackintosh, I. L. R., 4 Calc., 897. On appeal the Privy Council preferred to decide the case on the ground that the will in this case created a *charge* upon the property which had been devised to the defendant who was both devisee and executor; but their Lordships did not in any other way question the correctness of the ruling of the High Court (Grish *v.* Anundo, I. L. R., 15 Calc., 66).

Is the Government acting through the Court of Wards a trustee?

The Government, by allowing the Court of Wards to take charge of the estate of a deceased person, does not constitute itself a trustee for all the members of his family. If the Court of Wards erroneously makes over the property to an illegitimate son of the deceased, and that son commits treason, and forfeits his right to the property, a legitimate son of the deceased cannot treat the Government, who came into possession under a claim of forfeiture, as a person in whom property has become vested in trust for a specific purpose. (Vizaramamarazu *v.* Secretary of State, I. L. R., 8 Mad., 525, P. C.; Kamarlier *v.* Secretary of State, I. L. R., 11 Mad., 309, F. B.)

Who are express trustees.

In order to make a person an express trustee, it must appear either from express words or clearly from the facts that the author of the trust has entrusted the property to the trustee for the discharge of a particular obligation. (See Barkat *v.* Daulat, I. L. R., 4 All., 187, 189). A person may subsequently become a trustee by operation of law (I. L. R., 4 Calc., 455).

Trustee of his own wrong.

It has been held in England that if a person by mistake or otherwise assume the character of trustee when it really does not belong to him, and so becomes a trustee *de son tort*, he may be called to account by the *cestui que trust* for the monies received under colour of such trust. The self-constituted trustee cannot be heard to say, for his own benefit, that he had no right to act as a trustee. He cannot discharge himself from that trust by appealing to the lapse of time. (Lyell *v.* Kennedy, 14 App. Cas., 437, at pp. 459, 460 and 463). As to the *powers* of an executor *de son tort*, see Suddasook *v.* Ram Chunder, I. L. R., 17 Calc., 620.

When is property *vested* in trust.

"Property has become vested." Trust-property includes trust-money. (See Thackersey *v.* Hurbhum, I. L. R., 8 Bom., 432). Where property is held in possession by a Hindu trustee, it has become "vested" in him, although the ownership has not legally devolved upon him. (Per Markby, J., in Kherodemoney *v.* Doorgamoney, I. L. R., 4 Calc., 455, 468). But according to the Indian Trusts Act, 1882, the trustee is the *legal* owner of the trust property. In Dickenson *v.* Teasdale (1 D. G. J. and S., 52), Lord Westbury held that

Vested in trust.

"vesting" implied *property* in the subject-matter, and that a person who had merely power to charge the land was not a person in whom property had vested. And it has been recently held in India that property is not "vested" in a person simply because he has vested in him large powers of management and control over it. (Kathiawar *v.* Virchand, I. L. R., 18 Bom., 119, 131).

According to Pigot, J., monies belonging to A may be vested in B if B has "possession with all the indicia of property in respect of them so far as regards third persons." And it may be mentioned here that according to Pigot, J., the surplus sale-proceeds of a revenue-paying estate, held by the Collector in deposit on account of the late recorded proprietor under sec. 31 of Act XI of 1859, "become vested in the Collector in trust for a specific purpose," but according to the majority of the Judges in the Full Bench, the surplus money continues to be vested in the late proprietor and that the Collector does not become a trustee in whom such money becomes *vested* for any specific purpose. (Secretary of State *v.* Guru Proshad, I. L. R., 20 Calc., 51, F. B.)

Trust for a *specific purpose.*

"For any specific purpose." A purpose specified by the author of the trust (I. L. R., 4 Calc., 455, at p. 470). Some defined or particular purpose or object (I. L. R., 4 Calc., 897, at p. 923). According to sec. 6 of the Indian Trusts Act, II of 1882, the *purpose* of the trust, the *beneficiary*, and the trust *property*, must be indicated with reasonable certainty by any words or acts of the author of the trust. According to sec. 5 of the same Act, a trust in relation to *moveable* property may be created orally, provided the ownership of the property is transferred to the trustee. (The Indian Trusts Act is not yet in force in Bengal or Bombay). For an instance of a parol trust, see Sudda *v.* Ram, I. L. R., 17 Calc., 620. A resulting trust not being expressly declared in the trust deed is not a trust within the meaning of this section. (Manickavilu *v.* Arbuthnot, I. L. R., 4 Mad., 404. See also Nanalal *v.* Harlochun, I. L. R., 14 Bom., 476, at p. 481). Under sec. 2, Act XIV of 1859, even a resulting trust precluded the application of the law of limitation, and it was held under that Act that an executor who by the will was made an express trustee for certain purposes was, even as to the undisposed of residue, a trustee for the heirs of the testator. (Lullubhai *v.* Mankuvarbai, I. L. R., 2 Bom., 388). Where the owner of a single house devised all his realty to his executor upon trust, the declaration of the purposes of the trust being confined to the house only, it has been held in England that as regards other realty which the testator acquired subsequently to the date of the will, there was on the face of the instrument an express trust in favor of the heir of the testator. (Patrick *v.* Simpson, 24 Q. B. D., 128). But under Act XV of 1877, an executor although he may be made a trustee of some particular property for some specific purposes, is not thereby made a trustee for the heirs, of the residue which may be left undisposed of by the will or in respect of which the direction of the will is legally void. There is in such a case no declaration of trust with regard to the residue, and no direction given to distribute it among the heirs at law. (Nanalal *v.* Harlochun, I. L. R., 14 Bom., 476). A trust for a specific purpose in sec. 10 does not perhaps correspond exactly to an express trust in the English Act. (See I. L. R., 4 Calc., 455, at p. 470). Property entrusted to the defendant for the benefit of the plaintiff and his mother is property held in trust for a specific purpose within the meaning of sec. 10. (Sethae *v.* Krishna, I. L. R., 14 Mad., 61). One T, in anticipation of death, made over to his brother the key of his place of business, and requested him to take charge of his goods and outstandings, to pay thereout certain debts which he *specified*, and to apply the rest of the estate for his family.

Act XIV of 1859 applied to resulting trusts.

Under Act XV specific purpose must have been *declared.*

This *verbal trust* of moveable property was good, at least so far as the debts were concerned and could not, at any rate after the death of T, be recalled or questioned by his representatives. As there was *no* valid *testamentary* disposition, T's brother could not be treated as an executor. But the monies which reached his hands under the verbal mandate were monies held in *trust* for the specified creditors, and he could, and was bound to pay the specified creditors though their claims, in the absence of such a trust, would have been barred by limitation at the date of the payment. It was unnecessary to consider whether the defendant if he were not a trustee, but merely an executor *de son tort*, had power to pay *barred* debts. Trevelyan, J., in the first Court, held that an executor *de son tort* had such power, and that he was entitled to credit for sums actually paid for such debts. (Sudda Sook *v.* Ram Chunder, I. L. R., 17 Calc., 620). *Verbal* declaration of specific purpose of trust.

A mortgagee holding in deposit for the mortgagor the surplus proceeds of a sale of the mortgaged property under a power of sale in a mortgage deed empowering the mortgagee to sell, is an "express trustee" under sec. 25 of the English Act. (Banner *v.* Berridge, L. R., 18 Ch. D., 254 ; Charles *v.* Jones, L. R., 35 Ch. D., 544 ; I. L. R., 20 Calc., p. 63). But it has been held by the majority of a Full Bench of the Calcutta High Court that the Collector holding in deposit for the late proprietor the surplus sale-proceeds of an estate under sec. 31 of Act XI of 1859 is not a trustee within the meaning of the Indian Act. (Secretary of State *v.* Guru Prosad, I. L. R., 20 Calc., 51, F. B.) Surplus sale proceeds, held in *deposit* by the mortgagee, or by the Collector.

"Legal representatives or assigns." See pp. 265, 266 (note), *supra*, and Azimmunnessa *v.* V. C. Dale, 6 Mad., 455. A legatee or donee of the trustee not being an assign for valuable consideration is liable to the same extent as the trustee and the legal representative of the trustee. "Assign" includes an auction-purchaser in execution of a decree against the trustee. (Chintamoney *v.* Sarup, I. L. R., 15 Calc., 703). Representatives and assigns.

"Assigns for valuable consideration." If the assign for valuable consideration purchased the property in good faith, and without notice of the trust, he has no necessity to rely on any law of limitation. (See Darby and Bosanquet, 343 ; Manicklall *v.* Manchershi, I. L. R., 1 Bom., 269 ; Dayal *v.* Jivraj, I. L. R., 1 Bom., 237 ; and sec. 64 of Act II of 1882, and pp. 146, 189, *supra*). A Court of Equity constantly refuses to interfere in favor of a plaintiff seeking relief upon a (secret) equitable title against a purchaser of the legal estate for a valuable consideration without notice of the adverse title, if he avails himself of the defence at the proper time and in the proper mode. (See Story's Eq. Jur. by Grigsby, Eng. Ed. of 1884, p. 42 ; Ramcoomar *v.* McQueen, 18 W. R., 166, P. C. ; Maniklal *v.* Manchershi, I. L. R., 1 Bom., 269, 280). But see Durga Prasad *v.* Shambhu, I. L. R., 8 All., 86, and Bibee Jubunnissa *v.* Umal, 18 W. R., 151, as to the inapplicability of the doctrine in British India. Assigns for *value* without notice.

If the assign is merely a purchaser for a valuable consideration, arts. 133 and 134 protect him after the lapse of twelve years. But if the assign is a volunteer with or without notice, time does not run in his favor, in the same way as it does not run in favor of the trustee or his legal representative. See notes under arts. 133 and 134. Such assigns with notice. Volunteers.

"For the purpose of following in his or their hands such property." This means "for the purpose of recovering the property for the trusts in question." When property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the trustee, his legal representatives or assigns (not being assigns for valuable consideration). Following trust property.

Personal right to act as *trustee.*

If the plaintiff sue only for his own *personal* right to manage, or in some way to control the management of the trusts, sec. 10 does not apply. Where the defendant admits that he is a trustee, and says that he is applying the property to the trusts in question, and there is no evidence to show that he is not so applying the property, sec. 10 has no application (Balwant *v.* Puran, I. L. R., 6 All., 1, P. C.)

Beneficiary's right to re-attach trust property to object of trust.

Section 10 applies to a suit by the representatives of the founder of a private religious and charitable endowment, for the removal of the present mohunt, or manager of the endowment, on the ground that the trusts of the endowment have been continuously violated and the income misapplied, and for a declaration of the plaintiff's right to appoint a qualified person in the defendant's place. The object of the suit is to prevent a specific endowment from being diverted from its legitimate object, and to re-attach it to that object. It is not simply a suit to remove a person from the management of an endowment on the ground that although it is duly administered, the defendant has no *personal* right to administer it. If the defendant's removal from his position as head of the *mut*, is part of the relief claimed, it is only claimed as necessary to ensure due appropriation of the endowment to its original trusts.

Art. 143.

Art. 143 is not applicable to suits in which the property has vested in trust for any specific purpose, and there has been a continuous breach of trust. (Sothappayya *v.* Pereasami, I. L. R., 14 Mad., 1, at p. 8).

As regards property dedicated to charitable purposes, the trustee may have the right of management and the incidental right of enjoying the surplus profits secured to him and his heirs by the original grant. A suit by a succeeding trustee to recover this right of *management* against an alienee of the original trustee is not governed by this section, specially if the defendant is holding the property *subject* to the charges imposed upon it by the declaration of trust. The suit not being a suit for the purpose of *recovering the property for the trust*, sec. 10 is inapplicable. (Suppammal *v.* The Collector, I. L. R., 12 Mad., 387, as explained in Vedapurate *v.* Vollabha, I. L. R., 13 Mad., 402).

Sec. 10 when applicable.

It has been decided by the Privy Council, that the 12 years' rule is applicable when there is no question of recovering any property for the trusts of the institution, and when the plaintiff sues only for his personal right to manage or to control the management of the endowment. (Nilkandan *v.* Padmanabha, I. L. R., 14 Mad., 153, at p. 162; Sankaran *v.* Krishna, I. L. R., 16 Mad., 456, 459). A claim merely to vindicate the *personal* right of a trustee to the possession of property against another person claiming such right in the same character is not governed by sec. 10 (Karim Shah *v.* Natan, I. L. R., 7 Mad., 417). Compare Sreenath Bose *v.* Radhanath Bose, 12 C. L. R., 371, in which misconduct on the part of the trustee was proved. A suit by the trustee to recover the property of a temple from an ex-trustee who had been dismissed from his office by the Temple Committee, has been held to be within the section. (Virasami *v.* Subba, I. L. R., 6 Mad., 54. See also Sethu *v.* Subarmanaya, I. L. R., 11 Mad., 274). Where the defendant purchased from one of the two co-trustees of a temple, the right to manage the affairs of the temple, and enjoy certain land which formed the endowment of the temple, a suit by the other trustee to recover the land was held to be governed by art. 144, and not by sec. 10 (Kannan *v.* Nilakandan, I. L. R., 7 Mad., 337). In this case it was not shown that the defendant had misapplied the profits of the lands. Where there is no charge of misapplication of the trust property or fund, there can be no case of "following trust property in the hands of the trustee." (The New F. S. and W. Co. *v.* Kessowji, I. L. R., 9

Bom., 373, 398). Where the trusts under a will or deed are invalid, or become inoperative, any person claiming adversely to the trust, or on failure of the trust, cannot claim the benefit of sec. 10 as against the trustee appointed by such will or deed. A suit by such a person is not a suit to enforce the trust. (Kherodemoney *v.* Doorgamoney, I. L. R., 4 Calc., 455 ; Hemangini *v.* Nobin, I. L. R., 8 Calc., 788, at pp. 798, 801). In England (unless the case falls within the Trustee Act), the Statute of Limitation does not apply if an account is sought against an *express* trustee, although, in certain cases, where the relation of trustee and *cestui que trust* is admitted to be no longer subsisting, and in a few other cases, the Court will refuse relief on the ground of laches and acquiescence. It has been held in India that whether sec. 10 of Act XV applies to Directors of Companies, or not, laches on the part of the claimant is a valid defence to an action against such Directors. (Kathiawar *v.* Virchand, I. L. R., 18 Bom., 119). The Judicature Act, 36 and 37 Vict., c. 66, sec. 25, cl. 2, enacts that "no claim of a *cestui que trust* against his trustee for any *property 'held' on an express trust*, or in respect of any *breach of such trust*, shall be held to be barred by any Statute of Limitation." (See Saroda *v.* Brojonath, I. L. R., 5 Calc., 910, at p. 914). Under sec. 8 of the Trustee Act of 1888 (51 and 52 Vict., c. 59), all trustees are now allowed to plead limitation except in 3 specified cases. Thus if a breach of trust is not fraudulent, but innocent, such as, honestly investing trust money upon insufficient security, the trustee may plead limitation. (*In re* Somerset, 1894, 1 Ch., 231). Sec. 25 of 3 and 4 Will. IV, c. 27, only enacts that in suits to recover *real* property when such property being *vested* in a trustee upon any *express* trust has been conveyed by the trustee to a purchaser for a valuable consideration, the right to sue the purchaser arises at the date of the conveyance. Sec. 25 of the English Act corresponds to art. 134 of sched. II of the Indian Act. Since the Real Property Limitation Act, 1874 (37 and 38 Vict., c. 57, secs. 8 and 10), a suit to recover money secured by even an *express* trust is governed by the 12 years' rule like suits for money secured by any mortgage or otherwise charged upon any real property. (Warburton *v.* Stephens, 43 Ch. D., 39).

Claiming adversely to the trust.

Laches of the beneficiary.

Statutory provisions of English law.

"Following such property." Recovering the property originally entrusted to the trustee, or the property into which it has been converted, provided it is capable of being traced in the hands of the trustee, or his representatives not being assigns for valuable consideration. (See sec. 63 of the Indian Trusts Act, I. L. R., 8 Bom., 432 ; I. L. R., 11 Mad., 274). The modern rules of equity as regards *following trust money* apply without distinction to express trustees, agents, bailees, collectors of rents, and all others in a fiduciary position. (Per Jessel, M. R., *In re* Hallet, 13 Ch. D., 696 ; Brett's Leading Cases, 2nd Ed., pp. 2 and 3). Section 10 does apply to a suit to follow trust property in the possession of an assignee not for value. Trust property converted into other property, and held by the trustee in his own name, or in the name of an assignee not for value, can be followed. The same remarks apply to trust money used by a trustee in his own trade without authority, and trust funds mixed up by the trustee with his own funds. The presumption is that the trustee has still in his possession the trust fund, either in the state in which he originally had it, or in some other form of property into which he has converted it. (Sethu *v.* Subarnamaye, I. L. R., 11 Mad., 274, 279).

Following trust property.

Presumption that trustee still retains the property.

In Saroda *v.* Brojonath, I. L. R., 5 Calc., 910, it was held that where the object of the suit is not to recover any property *in specie*, but only to have an account of the trustee's stewardship, the plaintiff must, under art. 120, sue within six years (from the time he became

Suits for an account against a trustee.

Suit for account against express trustees and executors.

entitled to demand an account) and cannot have the benefit of sec. 10. But it has been held in England that if an account be sought against an *express trustee*, the statute of limitations not applying, it will be directed from the time the monies were received. (See Lewin on Trusts, 9th Ed., p. 1012). In a suit against an executor for an account, in the *absence* of an express trust, the account must be limited to sums received *within* the period of limitation before the institution of the suit. (Evans *v.* Moore, 1891, 3 Ch. C. A., 119). The correctness of the decision in Saroda's case has been in a manner questioned in Hurro *v.* Tarini, I. L. R., 8 Calc., 766. It was held in this last case that a suit against trustees to charge certain property with trusts created in respect of such property, and for an account, was governed by sec. 10. But Hemangini *v.* Nobin, I. L. R., 8 Calc., 788 (at p. 807), follows Saroda's case. See also Shapurjee *v.* Bhikaijee, I. L. R., 10 Bom., 243. Section 2, Act XIV of 1859, applied to all trusts (Greender *v.* Mackintosh, I. L. R., 4 Calc., 897), and *no suit whatever* by a *cestui que trust* against a trustee in his lifetime was barred by limitation under that Act.

Suit in trustee's lifetime for breach of trust. Cf. art. 98.

In Act XV of 1877 there is no express provision for a suit against a trustee in his *lifetime* for the loss occasioned by a *breach of trust*; but it has been held by Scott, J., that where trust money has become vested in the trustee for a specific purpose, and the loss of such money has been caused by the trustee's misconduct and improper dealing with it, a suit by the *cestui que trust* against the trustee for a refund of the money, although it has passed out of the hands of the trustee, is a suit for the purpose of following the trust property within the meaning of sec. 10 (Thackersey *v.* Hurbhum, I. L. R., 8 Bom., 432, 469).

Sec. 10 applies to suits *by* beneficiary only.

Although sec. 10 speaks of suits *against* trustees and their representatives, and does not say that the suits to which it refers must be instituted *by* any particular person, it has been held that the section applies only where a trustee is sued by a *cestui que trust* (Kherodemoney *v.* Doorgamoney, 2 C. L. R., 112; same case on appeal, I. L. R., 4 Calc., 455).

Successive beneficiaries.

A suit against the Dharmakurta or Mohunt of a temple, even after his removal from office, and by a succeeding Dharmakurta or Mohunt, for following the trust property in the hands of the former, is governed by this section. The *cestui que trust* being a juristical person is represented by the Dharmakurta for the time being. (Sethu *v.* Subramanya, I. L. R., 11 Mad., 274). But does this section apply where the trustee actually disavows his trust and sets up an adverse title? (See Stokes' Anglo-Indian Codes, Vol. II, p. 965; Story Eq., sec. 1520; Rakhal *v.* Modhu, 3 B. L. R., 409; I. L. R., 16 Mad., 456; 4 Mad. L. J., 23, secs. 14, 46, 71, and 77 of Act II of 1882, and pp. 146-147, *supra*).

Trustee setting up an adverse title.

Secretary of State, and Indian Govt. may be sued as trustees.

In the case of Kinloch *v.* Secretary of State in Council (L. R., 15 Ch. D., 1, at p. 9), there is a *dictum* of Lord Justice James that the Government of India is not capable of being a trustee. But on the authority of Clive Fund *v.* Secretary of State (10 H. L. Ca., 367), Pigot, J., is of opinion that the East India Company, the Government of India, and the Secretary of State may be trustees, and sued as such. (See Secretary of State *v.* Guru Prosad, I. L. R., 20 Calc., 51, 65).

Sec. 11. Suits on foreign contracts.

11. Suits instituted in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act.

No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

Sec. 11, cl. 2. Foreign limitation law.

[Cf. secs. 11 and 12, Act IX of 1871.

For a full commentary on this section, see pp. 36-39 and 234, *supra*.

"Extinguished the contract," *i.e.*, extinguished the right resulting from the contract. (Stokes' Anglo-Indian Codes, Vol. II, p. 965).

A suit instituted in a foreign country on a contract entered into in British India is governed by the limitation law of such foreign country. A bond signed and sealed in British India, if sued upon in England, is governed by the twenty years' rule under the 3 and 4 Will. IV, c. 42 (Alliance Bank of Simla *v.* Carey, 5 C. P. D., 429). Sec. 11 speaks of suits on contracts only. But all suits and proceedings are, on principles of international jurisprudence, required to be instituted within the period prescribed by the *lex fori*, *i.e.*, by the law of the Court in which the suit or proceeding is instituted (5 Moore I. A., 267). Dr. Stokes, in his Anglo-Indian Codes, Vol. II, p. 950, suggests that sec. 11 should be expressly extended to *all* obligations. As to suits relating to immoveable property, see note 9, p. 35, *supra*. Where the remedy only is barred by a foreign law of limitation, a suit may be maintained in British India provided it is not barred by the Indian Law of Limitation (see Nallatambi *v.* Ponnusami, I. L. R., 2 Mad., 400). For a converse case, see I. L. R., 6 Bom., 103, 107. Hindu or Mahomedan laws of limitation, if any, are foreign to the Courts of British India. (See p. 39, *supra*).

Principle of sec. 11, applicable to *all* obligations.

A decree of a Court in the Native State of Cooch Behar, when transferred for execution to a Court in British India, is governed by the law of limitation prevailing in the latter Court (Hookum Chand *v.* Gayrender, I. L. R., 14 Calc., 570). But the Legislature may *expressly* enact that a foreign rule of limitation shall be applicable to particular suits, although such rule has not extinguished the substantive right. For an instance, see sec. 8, Act XVII of 1886, relating to the cession of Jhansi.

It may be mentioned here that the Governor-General of India in Council has jurisdiction in some territories, *beyond* the limits of British India, and that there are British Courts exercising such jurisdiction in such territories. (See the Report on the Capital Sentence Bill, *Gazette of India*, Part V, 25th February 1893)].

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

[The provisions of secs. 5, 7, 8, and of the proviso to sec. 9, are, in effect, rules of computation and might be included in Part III. See pp. 242 (note) and 249, *supra*. Sections 7-9, and 12-25, merely enact how the prescribed periods of limitation are to be *computed*, and what *allowances* are to be made in such computations. Those sections (unlike sec. 5, cl. 2) do not give a Court any *discretion* as to *extension* of time. Per Edge, C. J., in Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at p. 486].

Sec. 12, cl. 1. Exclusion of day on which right to sue accrues.

12. In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

[Cf. sec. 13, Act IX of 1871.

"From."

See pp. 206, 207, 238-240, *supra*, as to the meaning of the word "from" and as to how a number of months or years is calculated. The date of attaining majority, or the date of the cessation of any other disability in cases to which sec. 7 applies, may be excluded under the provisions of sec. 12. (Jugmohun *v.* Luchmeshur, I. L. R., 10 Calc., 748). This clause applies to computations of periods of limitation. It does not apply to the computation of periods of exclusion, or suspension of limitation. (See notes to sec. 14, expl. 1).

"On" and "from."

Money borrowed may be repaid until 12 P.M. of the due date, and the right to sue accrues not *on* but *from* that date. (*In re* Palany, 4 Mad., 330). See also I. L. R., 6 Calc., 239].

Sec. 12, cl. 2. Exclusion in case of appeals and certain applications.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

[Cf. sec. 333 of Act VIII of 1859 and cl. 2, sec. 13, Act IX of 1871.

"Period of limitation prescribed." Period prescribed by Act XV of 1877 *or* by *any* special or local law. (See Beharilall *v.* Mengolanath, I. L. R., 5 Calc., 110; p. 218 (note), *supra*).

Pauper appeals.

"An application for leave to appeal as a pauper." This is mentioned in this clause, but it is not mentioned in cl. 2 of sec. 5. (See Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at pp. 487 and 488).

P. C. Appeals.

This clause does not apply to an application for the admission of an appeal to Her Majesty in Council under art. 177. (Laksmanan *v.* Peryasami, I. L. R., 10 Mad., 373). The time occupied in obtaining copies of the decree and judgment sought to be appealed to the Privy Council cannot therefore be excluded in the computation of the period prescribed by art. 177. (Anderson *v.* Priasami, I. L. R., 15 Mad., 169).

Time *requisite*.

Time *requisite* for obtaining a copy, &c., shall be excluded. If the delay in obtaining a copy is due to the *laches* of the appellant or applicant himself, he cannot claim the benefit of this provision. (Ramey *v.* Broughton, I. L. R., 10 Calc., 652, 661. See also Parbati *v.* Bhola, I. L. R., 12 All., 79). In order to entitle a party to the benefit of the provisions of this clause, the application for a copy must be made before the expiry of the prescribed period, *viz.*, 20, 30, 60 or 90 days, as the case may be. (*Ibid.*, p. 655). But according to a later (Full Bench) ruling of the Calcutta High Court, even if the decree is *actually* signed *after* the 20 or 30 or other number of days, the application for a copy of the decree may be made within the prescribed period from the date of the actual signing of the decree. (See Bani Madhab *v.* Matungini, I. L. R., 13 Calc., 104). Cf. Parbati *v.* Bhola, I. L. R., 12 All., 79, and Bechi *v.* Ahsanullah, I. L. R., 12 All., F. B., 461, 466. This clause, or any other provision which virtually suspends the running of time, will be of little avail if it does not cover the whole of the time, in excess of the period of limitation which elapses before the commencement of the proceeding.

Copy when to be applied for.

Under Circular No. 31 of 30th August 1879 of the Calcutta High Court, the whole of the court-fee and also the fees for the preparation of the copy and the materials for it must be supplied before the applicant is entitled to any exclusion of time. (See Nobin *v.* Brojendro, 12 C. L. R., 541, and Gungadas *v.* Ramjoy, I. L. R., 12 Calc., 30). An unavoidable omission to supply the requisite number of folios may be taken into consideration. (*Ibid.*) Both these cases refer to the practice of the Appellate Courts in the *mofussil*. This Circular finds no place in Mr. Wilkin's edition of the Circulars and Rules of the High Court, 1881, nor in Mr. Brett's edition of General Rules and Circular Orders, 1891. A Circular Order of the Allahabad High Court issued in 1882, for the guidance of the Lower Courts in the N.-W. Provinces, allowed a certain number of days (in every case) to the party applying for copies for compliance with the estimate furnished by the office. This Circular was considered to be legally invalid in Parbati *v.* Bhola, I. L. R., 12 All., 79, and Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, 476. The parties cannot by unnecessary delay in putting in the requisite number of sheets of stamped paper for the copies extend the period prescribed for appeal. But it would be grossly unfair to disallow the application if the requisite papers were not procurable, or if a mistake were made in calculating the number of sheets required. (Gungadass *v.* Ramjoy, I. L. R., 12 Calc., 30). Sometimes delay might be caused in the receipt by the office of the estimated charges owing to the stamps not being procurable, or to the office not being open to receive payment of those charges when the estimate should have been complied with. Such period of delay, and periods of delay arising from similar causes beyond the control of the applicant for copies, and not being the result of any action or want of action on his part, should be allowed in computing the "time requisite" for obtaining copies. (Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at pp. 478, 491).

Time requisite for obtaining copies.

What delays are excusable.

The time between the date on which the copy is ready for delivery, and the date on which the applicant chooses to take delivery of it, is not a portion of the time requisite for obtaining a copy (Gopal *v.* Brojo, 9 C. L. R., 293). The important date is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had *notice*, that the copy will be ready on that date. (Parbati *v.* Bhola, I. L. R., 12 All., 79). In the Central Provinces, the time between the date when the copy is ready and the date when it is delivered to the applicant might be excluded if the appellant was not guilty of undue delay in claiming his copy. But this is not the practice now. (See 4 C. P. L. R., 166, 188). In computing the time requisite for obtaining a copy, the day on which the requisite fees and papers have been filed, and the day on which a proper officer of the Court certifies that the copy is ready for delivery, must each be counted, and the whole time between these two dates, *both inclusive*, are to be excluded in the computation of the period of limitation. (See Maharajah Beer Chunder *v.* Mohamed Asgur, W. R., Gap No., p. 145 ; Secretary of State *v.* Mootooswamy, 13 W. R., 245 ; Gopal *v.* Brojo, 9 C. L. R., 293).

Copy *ready* for delivery, and copy actually delivered.

Time requisite how computed.

The practice on the Appellate Side of the Calcutta High Court (in appeals from the mofussil) is to exclude the time between the date of *application* and the date when the copy is ready for delivery.

Practice. Calc. H. Ct.

The fact that the opposite party obtained copies at an earlier date is not to be considered. (Bharutt *v.* Issur, 8 W. R., 141).

In Calcutta the appellant is entitled under sec. 12 to deduct the time between the delivery of the judgmen t and the actual signing of

Calc. F. B.

the decree, inasmuch as the decree cannot be copied before it is actually signed. (*In re* Chowdry Mohendro, 18 W. R., 512; Banimadhub *v.* Kalisunker, I. L. R., 13 Calc., 104, F. B.) If an application for a copy is made *before* the decree is actually signed, the appellant cannot avail himself of this rule, and *also* claim a deduction of the entire period from the date of the application to the date of the copy being ready for delivery.

Allahabad F. B. ruling.

It has been held by a Full Bench of the Allahabad High Court that sec. 5 of the Limitation Act cannot be applied in making the computation of time provided for by sec. 12, and does not become applicable until *after* such computation has been made. In computing the time requisite for obtaining copies no allowance can be made for delay caused by the inability by reason of poverty, to pay the estimated cost for copies. But if the stamps are not procurable, or the office is not open to receive payment of the estimated cost, allowance may be made for delay so caused. These and similar causes of delay may be considered under sec. 5, *after* the computation has been made under the other sections.

Difference between Calc. F. B. and All. F. B.

In computing the time to be excluded under sec. 12 from a prescribed period of limitation, the "time requisite for obtaining a copy" does not begin until an application for copies has been made. If, therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copies having been made, the applicant is *actually* and necessarily delayed, through the decree not having been signed. Bani Madhub Mitter *v.* Matungini Dassi, I. L. R., 13 Calc., 104, F. B., dissented from.

All. F. B.

Per Edge, C. J., Brodhurst and Young, JJ: A Court in computing under sec. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the *office*, after application made, in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the *office* in preparing the copy or copies ready to be delivered to the party who has applied for them. If the applicant failed to inform himself of the time when such copy would be ready and thereby did not obtain it when it was ready for delivery, the period of such delay cannot be allowed in computing the "time requisite."

Per Edge, C. J.—The only clause in the Limitation Act which enables a Court to admit an appeal or an application for review which is presented beyond the period of limitation prescribed by that Act is sec. 5, cl. 2.

Per Mahmood, J.—Where there is delay in complying with the estimate which is unavoidable and due to causes beyond the control of the applicant, such delay may be included in "the time requisite for obtaining a copy." Whether or not such delay is unavoidable, is a question of fact in each case.

Per Mahmood, J.—A bare mistake of law is not a "sufficient cause" within the meaning of sec. 5 of the Limitation Act for extending the period of limitation.

(Bechi *v.* Ahsanullah Khan, I. L. R., 12 All., F. B., 461).

Law Member's remarks on sec. 12.

"In the construction of the Limitation Act, the Court at Calcutta has taken one view as to the manner in which time for obtaining copies ought to be counted for purposes of appeal. The Court at Madras has, I understand, taken a different view; and as long as each Court consistently follows its own view as a mere matter of law

procedure, no harm is done ; but it so happened that the Court in the North-Western Provinces, after following for some time the practice of the Calcutta Court, suddenly discovered in a case reported in the 12th volume of the Allahabad Series of the Indian Law Reports that that view was wrong, and that it ought to have adopted the practice of the Madras Court. The consequence is that a number of cases, which would have been in time if the Court had continued to follow its old practice, were thrown out of time by the change of practice." Sec. 5A was inserted by Act VI of 1892 after sec. 5 of this Act, mainly with the object of preventing the occurrence of a similar hardship in the future. (See Sir Alexander Miller's speech, Proceedings of the Legislative Council, 26th March 1892. *N.B.*—I have not been able to find in the Reports any Madras Case shewing the practice here referred to).

Crim. appeals.

In the case of a prisoner in jail, the time taken in forwarding an application for a copy and in transmitting the same from the Court to the jail must be excluded. (Queen-Empress *v.* Lingaya, I. L. R., 9 Mad., 258). Time from date of *application*, excluded. (I. L. R., 10 Calc., 642).

Stamp for review.

An application for review, though in time under sec. 12, must bear *full* stamp if presented *after* the 89 days allowed by art. 4, sched. I, of the Court-fees Act. (Hiralal *v.* Musst. Gangabai, 7 Cent. Prov. L. Rep., 111)].

Sec. 12, cl. 3.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

Not applicable to P. C. appeals, Letters Patent appeals or pauper appeals.

[" Where a decree is appealed against." It has been said that these words, though ambiguous, may include the filing of an application for the admission of an appeal to Her Majesty in Council (Jawahir *v.* Narain, I. L. R., 1 All., 644). But as clause 2 does not mention such an application, it is apprehended that this clause does not apply to appeals to the Privy Council. Stuart, C. J., has, on other grounds, held that the clause does not apply to such appeals (*Ibid.*) No copy of the judgment need be filed in such a case (I. L. R., 15 All., 14, 19). Mahmud, J., is apparently of opinion that cl. 3 does not apply to an application for leave to appeal as a pauper (I. L. R., 12 All., at p. 95). It has also been held by a Full Bench of the Allahabad High Court that the clause does not apply to appeals under the Letters Patent (Fazul *v.* Phul, I. L. R., 2 All., 192). These Letters Patent appeals are governed by the rules of the Court. (See Hurruck *v.* Toolsee, 12 W. R., 458). Where a sentence or order is appealed against or sought to be reviewed, this clause does not apply.

Copies of judgment *and* decree.

This clause overrides Juggunnath *v.* Shewruttun, 24 W. R., 105, F. B., and allows exclusion of the time requisite for obtaining a copy of the judgment, as well as of the time requisite for obtaining a copy of the decree. Clause 3, however, applies to appeals and applications for reviews only, it does not apply to applications for leave to appeal as a pauper. (See Parbati *v.* Bhola, I. L. R., 12 All., 79, at p. 95).

Prov. S. C. Court Act.

The period of 15 days allowed to set aside the Registrar's order in respect of applications for the execution of decrees or orders, under sec. 21 of the Provincial Small Cause Courts' Act, 1887, is computed in accordance with the provisions of the Indian Limitation Act, as though the application for setting aside the order were an application for review of judgment. (Act IX of 1887, sec. 21, cl. 3). Applications for reviews are mentioned in sec. 5, cl. 2, and sec. 12, cls. 2 and 3].

Sec. 12, cl. 4.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

[See Art. 158, Sched. II, Act XV, and sec. 522, Civil Procedure Code].

Sec. 13. Exclusion of time of defendant's absence from British India.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

[Cf. sec. 13, Act XIV of 1859, and sec. 14, Act IX of 1871.

This section applies to suits only. It does not apply to applications (Ashan *v.* Gungaram, I. L. R., 3 All., 185).

English and Indian laws.

Plaintiff's absence from, or imprisonment in, British India, or defendant's imprisonment in British India, is not a ground of exclusion. (See Palkonda *v.* Secretary of State, I. L. R., 5 Mad., 91, 96, 103; Domun *v.* Shubul, 10 W. R., 253). The Statute of James I, cl. 16, sec. 7, contained a saving in case of the disability of the *plaintiff* by reason (among others) of his imprisonment or absence beyond seas. This saving by reason of plaintiff's imprisonment or absence, is now abolished by the Mercantile Law Amendment Act, 19th and 20th Vict., cl. 97, sec. 10. A saving in case of the *defendant's* absence beyond seas in suits on simple contracts or torts was first enacted by 4 Anne, Cap. 16, sec. 19, and is still in force in England. A similar saving is enacted with regard to *specialty debts* by 3 and 4 William IV, Cap. 42, sec. 4. There is no such exception in England as regards claims to *realty*. "A *plaintiff* out of the realm may prosecute a suit by his attorney; but when the defendant is out of the realm, it is very hard to call upon the plaintiff to institute a suit which in most cases must be wholly without fruit." Yet, until the enactment of 4 Anne, Cap. 16, sec. 19, defendant's absence beyond seas formed no exception to the operation of the Statute of Limitations in England. No exception, not expressly contained in an Act of Limitation, may be constructively introduced into it on any "principle of inherent equity." The Act or Statute must work upon all cases which are not exempted by *express* exception. (Beckford *v.* Wade, 17 Vesey, Junior, 87, at pp. 89–94, P. C.) As to the law under the Regulations, see note (3), p. 50, *supra*. Section 9 does not modify the provisions of this section.

No exception to be constructively introduced.

Sec. 13, not modified by sec. 9.

Absence during the beginning or any part of the period of limitation is a ground of exclusion. (See Hanmantram *v.* A. Bowels, I. L. R., 8 Bom., 561, and pp. 241 and 250, *supra*. See also Dawala *v.* Sitaram, 5 Cent. Prov. L. Rep., 88). The section applies whether, during the absence, service of summons on the defendant can be made or not. But the section does not prevent the plaintiff from suing the defendant if he can. (See Forbes *v.* Smith, 24 L. J. Exch., 299). The language of the section applies even to cases in which the defendant is represented by an agent in this country by whom suits for and against him may be conducted here. In Harrington *v.* Gonesh, I. L. R., 10 Calc., 440, a Division Bench of the High Court held otherwise, by refusing to give effect to the plain meaning of the section. (See p. 250, *supra*). But in Atulkristo *v.* Lyon & Co., I. L. R., 14 Calc., 457, at p. 463, the correctness of this ruling was questioned, and it was pointed out that the Privy Council had held that the fact of having an agent in British India did not affect the question. Absence does not necessarily imply a previous presence. Even if the defendant has never been in British India, he is within sec. 13, and is liable to be sued after an indefinite time in a

Sec. 13 applies even when defendant has an agent here.

Total absence, and previous presence.

Court in British India. (*Ibid.* See also Laford *v.* Ruddock, 22 L. J., C. P., 217 ; Forbes *v.* Smith, 24 L. J. Exch., 299). In the theory of international law, an ambassador is under the protection of, and responsible solely to, his own sovereign, and it would be an affront to his sovereign if process were issued against him in the Courts of a sovereign to whom he owes no allegiance. The protection extends to a reasonable time, even after his recall, until he returns to his own country. He cannot be sued in the Courts of the country to which he is accredited, because he is out of the jurisdiction of those Courts. He is constructively "beyond the seas." (See Musurus Bey *v.* Gadban, [1894], 1 Q. B., 533). Notwithstanding the provisions of sec. 433 of the Code of Civil Procedure, under which foreign princes and ambassadors may (under certain circumstances and under certain conditions) be sued in the Courts in British India, it may be held that a foreign prince or an ambassador in British India is constructively residing in his *own* country, and therefore "absent from British India." Foreign princes and ambassadors, constructively absent.

There is no express provision in this section as to what should be done in the case of the absence of *some* of several defendants. Section 8 expressly provides for the disability of some of several joint-creditors or claimants, and sec. 21, for acknowledgments and payments made by some of several defendants, but no such proviso is attached to sec. 13. According to the grammatical meaning of the section, the absence of some only of several defendants, even if they are joint-debtors, will not suspend the running of time. (See Perry *v.* Jackson, 4 T. R., 516 ; Darby and Bosanquet, p. 38 ; and Angell, para. 204, note). In Towns *v.* Mead, 16 C. B., 123, it was held in England that it would lead to injustice if the absence of some of the joint-debtors did not prevent the running of time. And in Fannin *v.* Anderson, 7 Q. B., 811, it was held that time did not run against the plaintiff during the absence of one of two co-contractors, and that he was not bound to sue at the peril of a plea of abatement. Section 11 of the 19th and 20th Vict., chap. 97, now expressly enacts that limitation *shall run* in favor of those joint-debtors who are within the territories, nowithstanding the fact that the other joint-debtors are abroad. It is also expressly provided that the mere fact that judgment has already been recovered against the former shall be no bar to a suit against the latter after their return. As the Indian Legislature has refrained from adopting the rule laid down in the English decisions on the Statute of Anne, and in the Mercantile Law Amendment Act, the grammatical construction of the section should be adopted in British India though it might lead to injustice. In British India, if some of the joint-debtors who are within the territories are insolvent, and the plaintiff waits for the return of the absent defendants, he will often find himself altogether barred by limitation. (See Hemendro *v.* Rajendro, I. L. R., 3 Calc., 353, 360). Dr. Stokes, in his Anglo-Indian Codes, Vol. II, p. 950, suggests that the Legislature should make some express provision for the case of several defendants, one of whom only has been absent from British India during the currency of the period of limitation. Absence of *some* of the defendants.

Mere entry within British jurisdiction for a temporary purpose, for instance, by touching in a vessel at Bombay, may not be a sufficient termination of the absence from British India. (See Banning, 87). But if the defendant has returned to British India, the plaintiff's *ignorance* of the fact does not suspend the running of time against him. See Mahomed *v.* Museehooddin, 2 N. W. P., 173]. When does absence terminate.

14. In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been Sec. 14, cl. 1. Exclusion of

time of proceeding *bonâ fide* in Court without jurisdiction.

prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

[Cf. sec. 14, Act XIV of 1859, and sec. 15, Act IX of 1871.

See pp. 249 and 250, *supra*, and the table of exceptions at p. 247*a*, *supra*.

Sec. 14 applies to special or local Acts, but not to Act X of 1859.

"Period of limitation prescribed." Period prescribed by this Act or by any special or local Act. (See Khetter *v.* Dinabashy, I. L. R., 10 Calc., 265; Guru Chariya *v.* President, I. L. R., 8 Bom., 529; Seshama *v.* Sankare, I. L. R., 12 Mad., 1). The provisions of sec. 14 are therefore applicable to suits for rent under Beng. Act VIII of 1869. They are expressly made applicable to suits under the Bengal Tenancy Act. (See sec. 185, Act VIII of 1885). But it has been held that Act X of 1859 being a complete Code in itself, the general provisions of Aet XV of 1877 are not applicable to suits for rent under Act X of 1859 in districts where that Act is still in force. (Nagendro *v.* Mathura, I. L. R., 18 Calc., 368, F. B.) It would seem, however, that the Full Bench would not have come to this decision if it were not for a Privy Council ruling under the old law. (See Unnoda *v.* Kristo, 19 W. R., 5, P. C.)

Bonâ fide mistake.

Section 14 provides for cases where a plaintiff in perfect good faith, but under a mistake, has sued in a wrong Court. (Khetter *v.* Dinabashy, I. L. R., 10 Calc., 265).

"The plaintiff." The section will not apply if the former proceeding was not prosecuted by the plaintiff (of the second suit) or by some person under whom he claims (Rajah Borodakant *v.* Sookmoy, 1 W. R., 29). The expression "the plaintiff" means the plaintiff or the plaintiffs in the second proceeding. Where *some* only of the plaintiffs had *bonâ fide*, and with due diligence, prosecuted another proceeding in a wrong Court, the Madras High Court held that they were entitled to the benefit of the provisions of this section. Practically the whole suit of all the joint plaintiffs was decreed, although some of them were not entitled to the benefit of sec. 14. (Narasimma *v.* Muttayan, I. L. R., 13 Mad., 451).

Proceeding by *some* of several plaintiffs. Cf. p. 604, *supra*.

Prosecuting.

"Prosecuting with due diligence another civil proceeding." "Prosecuted in good faith." The term "prosecuting" is in general applicable to a proceeding by a person as plaintiff. But the term has been applied to a person who, as a defendant in a former suit, had been unsuccessfully urging a claim of set-off. (See Moharajah Jugutender *v.* Din Dyal, 1 W. R., 310. (But cf. the remarks of Mahmud, J., in Mangu Lal *v.* Kandhai, I. L. R., 8 All., 475, at pp. 485 and 486). But such a person cannot claim the benefit of this section unless the set-off was disallowed for some defect of jurisdiction or some other defect of a like nature (Hafizunnissa *v.* Bhyrab, 13 C. L. R., 214). Where the plaintiffs supposed that they had a right, in the first suit against them, to claim a particular sum by way of set-off, and in this they turned out to be wrong in point of law, it was held that they were not entitled to the benefit of this section (*Ibid.*)

Defendant claiming a set-off.

Resisting an appeal.

Resisting an appeal presented by the defendant on the ground of want of jurisdiction is prosecuting a suit within the meaning of this section. See Expl. 2 and 24 W. R., 407, P. C. But it does not follow that resisting an appeal presented by the plaintiff of the first suit when the lower Court had dismissed that suit for defect of jurisdiction, is prosecuting a suit.

A plaintiff is engaged in prosecuting a civil proceeding with due diligence, whilst he is considering whether or no he shall appeal against the decision of the first Court; if he appeals at any time within the prescribed period, he may claim a deduction of the *whole* period which elapses between the decision of the first Court and the disposal of the appeal. (Rajkristo *v.* Beerchunder, 6 W. R., 308; Luckinarain *v.* Khettro, 24 W. R., 407, note).

Civil proceeding.

"Another civil proceeding." A suit, an appeal, or an application to a Civil Court is a civil proceeding. A proceeding to recover mesne profits in the execution department, and a suit for mesne profits, are both civil proceedings. (See Hurro Chunder *v.* Sooradhonee, 9 W. R., 402, F. B.) A proceeding before the Magistrate is not a civil proceeding. It has been recently held that a proceeding before the Revenue authorites under the Public Demands Recovery Act, Bengal Act VII of 1880, is a civil proceeding, within the meaning of this clause. (Grijanath *v.* Ramnarain, I. L. R., 20 Calc., 264).

Revenue proceeding.

In *Court*.

"Whether in a Court of first instance or in a Court of appeal." An arbitrator or a conciliator is not a *Court*. (See Monohar *v.* Gebiapa, I. L. R., 6 Bom., 31). But the time intervening between the application to a conciliator under the Dekkhan Agriculturists' Relief Act, 1879, and the grant of a certificate by him, must be excluded under sec. 48 of that Act, in computing the period of limitation of a *suit*, by such agriculturist (Durgaram *v.* Shripati, I. L. R., 8 Bom., 411). So the period during which the conciliator endeavours to effect an amicable settlement between the parties is, under Acts XVII of 1879 and XXIII of 1881, deducted in computing the period of limitation in certain cases (Venkatrav *v.* Bijesing, I. L. R., 10 Bom., 108).

Final determination of suit by highest Court.

Appeal includes first, as well as, second appeal. The whole time in which a plaintiff has been fruitlessly engaged in prosecuting a suit *bonâ fide*, and with due diligence, for the same cause of action, in which he fails in consequence of a *final* determination in the suit, whether upon appeal or otherwise, that the Court in which the suit was brought had no jurisdiction, is to be deducted. (Lukhinarain *v.* Khettro, 24 W. R., 407, note, P. C.) Where it was contended on the part of the defendant that, as the decision of the Subordinate Judge was annulled by the District Judge in consequence of a defect of jurisdiction, the time in which the plaintiffs were engaged in the second appeal to the High Court who *affirmed* the decision of the District Judge, cannot be deducted,—it was held by their Lordships of the Privy Council that, on a reasonable construction of the corresponding section of Act XIV of 1859, such contention was invalid and could not be supported. The dismissal of the second appeal was not sufficient to prove want of *bonâ fides* and due diligence in the prosecution of the suit in which the plaintiffs failed in consequence of the *final* determination of the question of jurisdiction by the High Court. (*Ibid.*, p. 408).

Prosecuting in good faith.

Whether a suit was prosecuted in good faith and with due diligence must, in almost every case, be more or less a question of degree, and the same course of action which, on the part of a plaintiff in a Presidency-town within reach of skilled advice, would indicate bad faith or want of diligence, might be consistent with both good faith and diligence in a mofussil community unfamiliar with the refinements of the law, and practically *inops consilii* on such matters. (Sheth Kahandas *v.* Dahiabhai, I. L. R., 3 Bom., 182, 184). Prosecuting an appeal or other proceeding which is expressly prohibited by law is not prosecuting a civil proceeding in good faith. (Ram Dass *v.* Watson, W. R., Gap No., 371; Fateh Ram *v.* Monohor, 3 Agra, 39). Prosecuting a suit until it appeared that the defendant died sometime before the filing of the plaint, does not necessarily show want of good

Good faith in conduct of suit.

faith and due diligence. The plaintiff may satisfy the Court that, in not ascertaining whether the party against whom he was proceeding was dead, he was not wanting in due care and caution (Mohun Chunder *v.* Azeem Gazee, 12 W. R., 45). If the plaintiff *knows* that he is suing in a wrong Court, he is not prosecuting his suit in good faith. (*Per* Jackson, J., in Chunder Madhab *v.* Bissessuree, 6 W. R., 184, at p. 186. See also 6 Central Prov. L. Rep., 85). Fraudulently undervaluing a suit and instituting it in the Munsiff's Court, who throws it out for want of jurisdiction, is not prosecuting a suit in good faith. Where a plaint is returned (under section 57, Civil Procedure Code) to be presented to the proper Court, the plaintiff is entitled to claim the benefit of sec. 14, provided he has acted in good faith and with due diligence. (See Obhoy *v.* Kritarthamoyi, I. L. R., 7 Calc., 284; Khetter *v.* Dinobashy, I. L. R., 10 Calc., 265). The terms "good faith" and "due diligence" have reference solely to the *conduct* of the suit. The institution of a suit on the last day within time does not show any want of "due diligence."

Unintentional mistakes.

It is difficult to see how a mistake (of law or of fact or of both) should arise which *complete* care and knowledge might not have prevented. It seems that a mistake actually made, if *made unintentionally*, is likely to have been made in good faith. (See Jogannath *v.* Musst. Chandbi, 6 Cent. Prov. L. Rep., 85).

Proceeding against *some* of the *defendants.*

"Against the defendant." A former proceeding against a person *other* than the defendant or any person from or through whom the defendant derives his liability to be sued, is not sufficient (Musst. Munna *v.* Laljee, 1 W. R., 121). A former proceeding against one of the defendants in the subsequent suit is not sufficient, specially where the former proceeding was nonsuited for nonjoinder of the parties who are made defendants in the subsequent suit. In such a case the plaintiff's claim against none of the defendants will be saved by sec. 14 (Nilmadhub *v.* Kristo Dass, 5 W. R., 281). Those defendants who were not parties to the former proceeding are not bound by the provisions of sec. 14. (Bran. Dig., Unrep. Jt., Bom., 210; 8 Bom., 228. Cf. p. 604, *supra*). A proceeding *bonâ fide* commenced against a debtor who is dead at the time may be a good proceeding under this section against the legal representatives of the debtor; but a proceeding against a person erroneously supposed to be the legal representative of the debtor is of no avail against the true legal representative of the debtor (Mohun Chunder *v.* Azim Gazi, 12 W. R., 45; Kavasji *v.* Barjorji, 10 Bom., 224). See notes to sec. 22.

Suing one who does *not* represent debtor.

Same cause of action.

"Same cause of action." The claim or demand which the plaintiff seeks to enforce, if recoverable, is a "cause of action." (Hurro Chunder *v.* Shoorodhonee, 9 W. R., 402, 406). The cause of action must be the same in both the proceedings. It was held in one case that if the cause of action was substantially the same, the section might apply. (Shah Keramat Hossein *v.* Golab Koer, 3 W. R., 101). According to Mr. Justice Mahmud this was a too liberal interpretation of an exception to the ordinary rule of limitation. (Mangulall *v.* Kandhailall, I. L. R., 8 All., 475, at p. 483). Where the plaintiff brought two suits, one against one branch of the family, and the other against another branch, to recover a share of that portion of the property which was in the possession of each, respectively, and these suits were rejected on the ground of their having been improperly brought, it was held that, in bringing a *consolidated* suit for a general partition against all the sharers, the plaintiff was not entitled to deduct the time occupied in prosecuting his former suits. (Jotaram *v.* Bai Ganga, 8 Bom., 228). A claim of a proprietary right is not the same as a claim of a mere leasehold right. (See Parkut *v.*

Two suits consolidated.

Edapally, 2 Mad., 226). Under the Regulations, the period of the pendency of a suit for the *possession* of land could be deducted in computing the period of limitation for a subsequent suit for the mesne profits of such land. (Unnoda *v.* Surno, W. R., F. B., 163).

"In a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it." Jurisdiction may be circumscribed with respect to place, person, pecuniary value of subject-matter, or nature of subject-matter. (See Vishnu *v.* Krishnarao, I. L. R., 11 Bom., 160, at p. 170 ; Dhansing *v.* Basant, I. L. R., 8 All., 519, at p. 527). Jurisdiction.

The term "Court" has not been defined to mean a Court having authority in British India or established by the Government of India in British India. It may include a foreign Court. (See Parry *v.* Appesami, I. L. R., 2 Mad., 407). Foreign Court.

In sec. 14, Act XIV of 1859, the words "of a like nature" were not used ; but the interpretation put upon the words "other cause" was that the other cause must be of a like nature with "defect of jurisdiction." (For this principle of interpretation, see p. 177, note, *supra*. For the words "unable to entertain it" in Act XV, Act XIV had "unable to decide upon it," and Act IX had "unable to try it." The words "unable to entertain it" are, it is apprehended, more comprehensive than the corresponding words in the previous Acts. In Hurro *v.* Shoorodhonee, 9 W. R., 402, Peacock, C. J., was of opinion that there was no difference between "not having power by law" to decide upon a question and "being unable for want of jurisdiction to decide upon it," and that at all events "not having power or authority by law" was a cause of a like nature with defect of jurisdiction. But the majority of the Court were of opinion that it was one thing to say that a Court had not the power to make, or could not properly make, a particular order in a suit, and quite another thing to say that the Court had not jurisdiction to entertain the suit, or the particular application which it ought not to grant. Where a proceeding in the execution department for recovery of mesne profits had been finally dismissed, because the Appellate Judge thought that the lower Court had no power to import into a decree what it did not expressly declare, it was held by the majority of the Court that the proceeding had not been dismissed for defect of jurisdiction or other cause of a like nature. The term "jurisdiction," however, is often used in the more comprehensive sense of "legal authority" or "extent of power." (See Dhansing *v.* Basant, I. L. R., 8 All., 519, at p. 527). *Other* cause. Is "no jurisdiction," same as "no power by law."

Section 23 of the Provincial Small Cause Courts Act, 1887, expressly enacts that if a Court of Small Causes returns a plaint on the ground that the suit involves a question of title which it cannot finally determine, the Court shall be deemed to have been "unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction." Prov. S. C. Ct. returning plaint.

Where a Court had really no judicial cognizance of the suit until a preliminary condition (such as the filing of a certificate from the Collector under sec. 6 of the Pension Act, XXIII of 1877) had been satisfied, it was held that there was a defect of jurisdiction within the meaning of the section (Putali *v.* Tulja, I. L. R., 3 Bom., 223, 227). But the plaintiff's failure to register a compulsorily registrable certificate or other document, and to produce the same in Court, is not a defect of jurisdiction or other cause of a like nature. (Bai Jamna *v.* Bai Ichha, I. L. R., 10 Bom., 604). Not filing certificate.

In Mohun Chunder *v.* Azim Gazi, 12 W. R., 45, Sir Barnes Peacock, C. J., held that the defendant having died before the filing of the plaint, Suing a dead man.

the Court had no jurisdiction to decide upon the case, and that if the plaintiff was not wanting in due care and caution, he was entitled to the benefit of the principle of this section in prosecuting his suit against the representatives of the deceased defendant.

Suits over- and under-valued.

Where a Subordinate Judge returns the plaint because the plaintiff has overvalued his suit, the Judge does so because he cannot entertain the suit by reason of a cause similar to defect of jurisdiction, and the plaintiff (if he has acted in good faith) is entitled to avail himself of the provisions of sec. 14. (Obhoychurn *v.* Kritarthamoyee, I. L. R., 7 Calc., 284). If the suit is undervalued and (in good faith) instituted in the Munsiff's Court when it should have been instituted in the Subordinate Judge's Court, there is a defect of jurisdiction, and the plaintiff is, of course, entitled to the benefit of this section, if the Munsiff does not entertain his suit. (See Seshama *v.* Sankara, I. L. R., 12 Mad., 1).

Munsiff's Court, and Court of Small Causes.

Where there is no ground for holding the plaintiff to have been wanting in due diligence in prosecuting a suit in the Munsiff's Court, which that Court dismissed as being cognizable by the Court of Small Causes, about 18 months after the institution of the suit, the plaintiff in reinstituting the suit in the proper Court is entitled to a deduction under sec. 14. The plaint in this case was returned to the plaintiff for presentation in the Court of Small Causes. (Saminadha *v.* Samban, I. L. R., 16 Mad., 274).

Mistake of law—*bonâ fide* or not.

Section 14, it has been held at Allahabad, does not contemplate cases where questions of defect of jurisdiction arise from simple ignorance of the law, the facts being fully apparent; but is limited to cases where from *bonâ fide* mistake of fact, the suitor has been misled into litigating in a wrong Court. (Ramjiwan *v.* Chand Mal, I. L. R., 10 All., 587. But cf. Hurro Chunder *v.* Surnomoyi, I. L. R., 13 Calc., 266). It has been held in Madras that a mistake in law may under certain circumstances be a "sufficient cause" within the meaning of sec. 5. (Krishna *v.* Chathappan, I. L. R., 13 Mad., 269). Mahmood, J., is of opinion that there can be no such thing as a *bonâ fide* mistake of law. (Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, at p. 481). For other cases, see p. 575, *supra*. In Hall *v.* Venkatakrishna, I. L. R., 13 Mad., 394, Ayyar and Shephard, JJ., held that sec. 14 applies to a plaintiff who under a *bonâ fide* mistake of law brings a suit for malicious prosecution in a Court of Small Causes, and on the plaint being returned, reinstitutes the suit in the Munsiff's Court. The mistake in instituting a suit in a wrong Court may have been made in good faith, if it was not a pretended mistake intentionally made as with a view of delaying the proceeding or harassing the opposite party. (Jagannath *v.* Musst. Chand Bi, 6 Central Prov. Law Rep., 85). It should be borne in mind that equity often gives relief to a party who has acted under the influence of a mere mistake of the law. See notes to art. 96.

Where there is no defect of jurisdiction or like defect.

There is no defect of jurisdiction or a like defect, where a suit is dismissed for the plaintiff's omission to give the boundaries of the land sued for. (Chunder *v.* Bissessuree, 6 W. R., 184); or where a suit is dismissed because it is brought by an agent in his own name (Rajendro *v.* Bulaky, I. L. R., 7 Calc., 367); or where a claim to set off is disallowed because it is against the law relating to pleas of set-off (13 C. L. R., 214). In Ram Subhog *v.* Gobind, I. L. R., 2 All., 622, Stuart, C. J., and Oldfield, J., held that the misjoinder of causes of action by two plaintiffs was a defect for which the plaintiffs were responsible, and that it was not a defect of jurisdiction, or other "cause of a like nature." In Deo Prosad *v.* Pertab, I. L. R., 10 Calc., 86, Mitter and Tottenham, JJ., refused to follow this ruling, and held that misjoinder of causes of action against several defendants was a

Misjoinder of causes of action.

"cause of a like nature." This decision though not followed in Allahabad (see Jema *v.* Ahmad, I. L. R., 12 All., 207) has been followed in Madras. (See Narasimma *v.* Muttayan, I. L. R., 13 Mad., 451). According to the Allahabad High Court, the nonjoinder of necessary parties is a defect caused by the negligence of the plaintiff and not by anything beyond his control. Such a defect is not similar to a defect of jurisdiction. (Lachman *v.* Nimhoo, 17 W. R., 266; Jema *v.* Ahmad, I. L. R., 12 All., 207). Nonjoinde of parties.

A suit dismissed for non-service of summons under secs. 97 and 99*a* of the Civil Procedure Code, or dismissed under sec. 98, because neither party appears on the day of hearing, or withdrawn for defect of parties, or otherwise under sec. 373, is not a suit which the Court is unable to entertain from defect of jurisdiction or other cause of a like nature. (See Chunder Madhub *v.* Bissessuri, 6 W. R., 184; Pirjade *v.* Pirjade, I. L. R., 10 Bom., 681; Bai Jamna *v.* Bai Ichha, I. L. R., 10 Bom., 604; Krishnaji *v.* Vithal, I. L. R., 12 Bom., 625). A mere withdrawal of the suit, with or without the permission of the Court, does not prevent time from running. (See sec. 374, Civ. P. Code, and the cases cited at p. 453 of I. L. R., 13 Mad.) A defect of jurisdiction is due to the provisions of the law itself (Bai Jamna *v.* Bai Ichha, I. L. R., 10 Bom., 604). Any neglect or laches of the plaintiff, either in stating his case or prosecuting his suit, is not a defect of jurisdiction or other cause of a like nature. The inability of the Court to entertain the suit must arise from either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself and unconnected with the acts of the parties (Chunder Madhab *v.* Bissessuri, 6 W. R., 184). Suing in the name of a person who is only a manager of the party entitled to bring the suit (I. L. R., 7 Calc., 367), or omitting to state in the plaint the grounds of exemption from the operation of limitation, is not a defect similar to defect of jurisdiction (Nobin *v.* Rojomoyi, I. L. R., 11 Calc., 264). Withdrawal of suit. What constitutes defect of jurisdiction.

According to Peacock, C. J., it does not matter whether a final decision throwing out a suit or proceeding for want of jurisdiction is legally right or wrong. If the former suit has been dismissed on the alleged ground of want of jurisdiction, the plaintiff may claim a deduction in the computation of the period of limitation (Hurro Chunder *v.* Shoorodhonee, 9 W. R., 402, F. B., at p. 410). But the majority of the Judges in the Full Bench did not concur in this opinion. Where final decision is incorrect.

The plaintiff is entitled to the benefit of the section even if he institutes the second suit before the first is actually dismissed for want of jurisdiction (Moris *v.* Sopanthula, 6 Mad., 45)]. 2nd suit instituted before 1st is dismissed.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, sec. 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded. Sec. 14, cl. 2. Like exclusion in case of order under Civil Procedure Code, sec. 20.

[This applies where proceedings in a suit are stayed by reason of the defendant, or all the defendants, not residing within the jurisdiction of the Court. See Table of Exceptions (p. 247*a*)].

The words "date of the order staying proceedings" and "time requisite for going from one Court to the other" do not include the

interval between the dates of the *order* staying proceedings and of the *actual return* of the plaint by the Court. (Padmanabhuni *v.* Penugonda, 3 Mad. L. J., 270; Abhoya *v.* Gour, 24 W. R., 26)].

Sec. 14, cl. 3. Like exclusion in case of application.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief shall be excluded, where the last-mentioned application is made in good faith to a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

[Clause 1 allows a deduction in the computation of the period of limitation of a suit supposing there has been a previous suit or application relating to the same matter. This clause allows a similar deduction in the computation of the period of limitation of an application, supposing there has been a previous application relating to the same matter. Under this clause the time during which a decree-holder has been prosecuting with due diligence an application for execution of his decree before a Court which he in good faith believed to be the Court having jurisdiction, should be excluded in computing the period of limitation. (See Rajah Promothonath *v.* Watson & Co., 24 W. R., 303, a ruling in accordance with which the law has now been amended). See also Rajbullubh *v.* Joykishen, I. L. R., 20 Calc., 29. Application to the proper Court, under art. 179, gives a fresh start. A *bonâ fide* application to a wrong Court entitles the decree-holder to a deduction in the computation of the period of limitation.

Difference between applying to *proper* and to *wrong* Court.

Section 14 applies to suits and applications. It does not apply to appeals. The sort of indulgence mentioned in this section is, however, analogically imported into sec. 5, and an appeal presented to a wrong Court *bonâ fide* (that is, under an honest though mistaken belief formed with due care and caution) may be admitted by the proper Court if there is no further delay than what took place in the wrong Court. (Balwant *v.* Gumani, I. L. R., 5 All., 591; Jaglal *v.* Harnarain, I. L. R., 10 All., 524; Ramjeevan *v.* Chandmal, I. L. R., 10 All., 587). See notes to sec. 5, cl. 2].

Appeal to wrong Court.

Sec. 14. Explanation 1.

Explanation 1.—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

[In secs. 13 and 16, the proviso to sec. 9, and cl. 2, sec. 12, there is *no express* provision that the *day* on which the state of things, causing the (virtual) suspension of limitation, *begins* to exist, as well as the day on which it *ceases* to exist, should be counted among the days to be *excluded* in the plaintiff's favor. In the computation of the period during which the *suspension* continues, the Legislature has not laid down the *universal* rule that *fractions* of days are to be counted as *whole* days. *Express* provision has been made only in cases of suspension under secs. 14 and 15. (See Shephard's Law of Limitation in India, 2nd Ed., p. 22, and Stokes' Anglo-Indian Codes, p. 950). As to exclusion of the period requisite for obtaining copies of judgments and decrees under cl. 2, sec. 12, see notes to that clause.

Computation of period of *suspension* of limitation.

Previous proceeding when ended.

The explanation limits the time allowed to the date when the proceedings in the first suit or application *ended*. When the order of the High Court referred the prior suit to the lower Court and directed it to pass a fresh order after making a certain enquiry, the order of the High Court did not end the prior suit. The prior suit would

terminate only when a fresh order would be passed by the lower Court, provided no appeal be preferred against it. (Sankaran *v.* Parvathi, I. L. R., 12 Mad., 434). The date of the dismissal of an appeal against an order directing the plaint to be returned for presentation in the proper Court is the date when the prior suit terminated. The date of the *actual return* of the plaint by the Appellate Court cannot be taken into consideration. (See Abhoya *v.* Gour, 24 W. R., 26; Ramapurath *v.* Iringaloor, 3 Mad. L. J., 190)].

Explanation 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section. Explanation 2.

[As to what is prosecuting a suit, see notes under cl. 1, sec. 14. A defendant resisting an appeal presented on the ground that the lower Court had wrongly dismissed the suit for an alleged defect of jurisdiction cannot, it is apprehended, be deemed to be "prosecuting a suit," though the plaintiff in prosecuting such appeal is certainly *prosecuting* his *suit*. A defendant resisting an appeal presented on the ground that the lower Court had wrongly allowed defendant's plea of set-off, may, however, be deemed to be *prosecuting* a *suit* for the amount of the set-off]. Resisting an appeal.

15. In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded. Sec. 15. Exclusion of time during which commencement of suit is stayed by injunction or order.

[Cf. sec. 16, Act IX of 1871.

See the Table of Exceptions, p. 247*a*, *supra*. For an instance of the application of this section, see Shunmugum *v.* Moidin, I. L. R., 8 Mad., 229.

The section does not apply to applications for execution, even where the execution has been stayed by an injunction. (See Rajarathnam *v.* Shevalayammal, I. L. R., 11 Mad., 103). But this difficulty is often evaded by considering the application of the decreeholder, after the removal of the injunction, as only an application for the continuation of the former proceedings, supposing applications for execution had been made before the issue of the injunction. (Kalyanbhai *v.* Ghanesham, I. L. R., 5 Bom., 29; Kazilutful *v.* Shumbhudin, 10 C. L. R., 143; I. L. R., 8 Calc., 248; Issur *v.* Abdool, I. L. R., 4 Calc., 415; Hurronath *v.* Chunilal, I. L. R., 4 Calc., 877). Where *execution* is stayed.

It has been held that the institution of a suit for the recovery of a debt which has been attached by an execution creditor of the plaintiff under section 268 of the Civil Procedure Code, is not stayed by injunction or order within the meaning of sec. 15. (Shib Singh *v.* Sitaram, I. L. R., 13 All., 76). Though the plaintiff is prohibited by a written order of the Court from recovering the debt he must not, it has been held, neglect to sue for the debt within the ordinary period of limitation. Effect of *attachment* of debts.

An attachment of a debt secured by a bond, or an injunction obtained by a third party and restraining the attaching creditor from subsequently bringing the bond to sale in execution of his decree, is not "an injunction or order staying" the institution of a suit upon the bond by the obligee. (Collector *v.* Beti, I. L. R., 14 All., 162). But see Shunmugam *v.* Maidin, I. L. R., 8 Mad., 229.

For another provision for exclusion, see sec. 325*a* of the Civil Procedure Code. See the note to Explanation I, sec. 14, *supra*].

Sec. 16. Exclusion of time during which judgment-debtor is attempting to set aside execution-sale.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded.

[Cf. sec. 17, Act IX of 1871.

See the Table of Exceptions, p. 247*a*, *supra*; sec. 311, Civil Procedure Code; Gopal *v.* Raj Chunder, 2 W. R., Misc., 9, and arts. 137, 138 and 166, Sched. II of this Act.

Here the first proceeding is prosecuted by the judgment-debtor, not by the decreeholder or the plaintiff, and the cause of action in the two proceedings is not the same. The conditions of good faith, due diligence, and defect of jurisdiction are also not necessary].

Sec. 17. Effect of death before right to sue accrues.

17. When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

When a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

Nothing in the former part of this section applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

[Cf. sec. 18, Act IX of 1871.

See the Table (p. 247*a*) and pp. 240-243, *supra*.

Generally speaking, executors and administrators are legal representatives. As to who else may be legal representatives, see note, p. 265, *supra*. As a suit may be instituted or an application made, before a certificate under the Succession Certificate Act (VII of 1889) is obtained, the issue or non-issue of such a certificate does not affect the question which arises under sec. 17.

Existence of *two* persons necessary.

A perfect cause of action cannot exist unless there is a person in existence capable of suing, and until there is somebody who may be sued. If such a cause of action has already accrued, and time has once begun to run, no subsequent disability or inability to sue stops it. (Sec. 9). "If the statute has not begun to run during the lifetime of an intestate, then it does not begin to run until letters of administration to his estate have been taken out." (Burdick *v.* Garrick, L. R., 5 Ch., 241). Letters of administration, however, are not necessary in every case in British India. (See p. 265, note, *supra*, and Pogose *v.* Beebee Dishkhoon, 2 C. L. R., 278; Greender *v.* Mackintosh, 4 C. L. R., 193, 200; and Act V of 1881, sec. 82).

Though under sec. 266 of the Indian Succession Act, X of 1865, a legatee or a creditor of the deceased may sue an executor *de son tort*, *i.e.*, an executor of his own wrong, such an executor is not a "legal representative" of the deceased within the meaning of this section. Letters of administration granted to one of the heirs of an intestate *limited* to the extent of *his interest* in the estate are wholly invalid. (In the goods of Ram Chand Seal, I. L. R., 5 Calc., 2), and even if valid in regard to such limited interest, are not letters of administration within the meaning of sec. 190 of Act X of 1865. Even after the grant of such letters of administration, the estate of the deceased remains unrepresented and no suit is maintainable against it. (Framji *v.* Adarji, I. L. R., 18 Bom., 337).

Executor *de son tort* and administrator of *part* of estate,—not legal representatives.

If a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when (say 10 A.M. of that day) the debt became payable, it will be presumed that he died after that moment, so that limitation shall not commence to run until letters of administration are taken out. (Atkinson *v.* Bradford, 25 Q. B. D., 377, at p. 382). It does not lie upon the plaintiff to prove that the intestate creditor died before the cause of action accrued. (*Ibid.*)

Death *before* accrual of right *presumed*.

Where the right to sue has not accrued to a creditor, and time has not commenced to run against him, the fact of there being an interval between his death and the existence of a legal representative capable of suing, will have the effect of preventing the running of time against the estate of the deceased creditor. If the cause of action accrues during such interval, the legal representatives of the creditor will have the full period of limitation from the date of his becoming such legal representative. If such cause of action accrues to a minor or insane representative, he is entitled to the benefit of sec. 7 as well of sec. 17. In the case of the death of the debtor before the accrual of the cause of action, time will not run against the creditor until there is a legal representative of the debtor. As limitation may begin to run although the defendant is absent from British India, if an absent defendant dies abroad (after the accrual of the right to sue), the plaintiff, though entitled to the benefit of sec. 13, is not entitled to the benefit of this section. Time would not be allowed him (as it is, according to English law) for the appointment of an administrator to the estate of the defendant. (Sheppard, 2nd Ed., 143).

Sec. 17 explained.

Where representative is a minor.

Death of absent defendant abroad *after* accrual.

This section applies to all suits except suits for pre-emption and suits for the possession of immoveable property or hereditary offices. The application of the rule to such cases would tend to create insecurity of title. This section applies to all applications, but not to any appeal.

Exceptions.

As to who are legal representatives, see p. 265 (note), *supra*. It should be here remarked that an executor may sue before he has proved the will, and he may be sued after he has proved the will, or after he has acted as executor before proving. An administrator can sue or be sued only from the date of the letters of administration. (See Darby and Bosanquet, pp. 31-33; Banning, pp. 229, 232). The executor does not become a legal representative until he has obtained probate. (*Per* Markby and Prinsep, JJ., in Prosunno *v.* Kristo, I. L. R., 4 Calc., 342, at p. 345). Under the old law in the case of a testator, in respect of whose estate letters of administration could not be applied for by a creditor, the party in possession of the estate was treated as his representative until probate had been obtained by the executor. (*Ibid.*)

When may executors and administrators sue and be sued.

Paragraph 1. An administrator suing under art. 86 on a policy effected on the life of an intestate person (governed by the Indian Succession Act) illustrates the first paragraph of this section.

Paragraph 2. A suit for an account under art. 89 against the administrator of an agent, whose agency terminated on his death, and from whom no account had been demanded and refused during his lifetime, illustrates the second paragraph of this section. (See Lawless *v.* Calcutta Landing and Shipping Co., I. L. R., 7 Calc., 627)].

Sec. 18. Effect of fraud.

18. When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

[Cf. sec. 9, Act XIV of 1859, and sec. 19, Act IX of 1871.

See Table (p. 247*a*) and pp. 42, 44, 47, 131, 240 (note), 249, and 250, *supra*.

"Any person having a right to institute a suit or make an application." If the right to sue or to apply has ceased to exist under other provisions of the law this section will not help the plaintiff or the applicant. A judgment-debtor may apply to set aside an execution sale of his property even after the 30 days allowed by art. 166, provided his case falls within the purview of sec. 18 or of some other exception. In one case it was held by Petheram, C. J., and Ghose, J., that if the sale is once confirmed, the debtor has no right to make an application for setting aside the sale, even though it be alleged that the sale was fraudulently kept from his knowledge until after confirmation. (Gobind *v.* Uma Charun, I. L. R., 14 Calc., 679). This case has been subsequently overruled by a majority of the Judges in the Full Bench Case of Mohendro *v.* Gopal, I. L. R., 17 Calc., 769. Where circumstances affecting the validity of a sale in execution have been brought about by the fraud of one of the parties to the suit, the period of limitation for an application to set aside the sale whether such sale has been confirmed or not, may be computed from the time when the fraud by which the sale or the irregularities were kept concealed, first became known to the applicant. (*Ibid.*)

A sale may be set aside even after confirmation.

Defendant's dishonesty, or plaintiff's ignorance.

The law of limitation in this country being express, dishonesty in obtaining possession will not prevent the possessor from availing himself of the provisions of that law. (*Per* Sir Barnes Peacock, C. J., in Kowar Poresh *v.* Watson, 5 W. R., 283). Except where plaintiff's knowledge is an ingredient of his cause of action (see pp. 230, 231,

supra, and arts. 32, 48, 90-92, 94-96, 113, 114, 118, and 127), the plaintiff's ignorance of his right to sue does not prevent time from running against him. But it is otherwise, if such ignorance has been brought about by the fraud of the defendant. (Azroal *v.* Lalla Gopinath, 8 W. R., 23 ; Reaz Ali *v.* Government, 19 W. R., 269). In order to constitute fraud, "it is not sufficient that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title while the rightful owner is ignorant of his claims ; there must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts." (Dean *v.* Thavaite, 21 Beav., 621 ; Darby and Bosanquet, 193). In the case of immoveable property a concealed fraud does not mean the case of a party entering wrongfully into possession, but means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold. (Petre *v.* Petre, 1 Drew., 393 ; Brown, 505).

Ignorance brought about by *fraud*.

Concealed fraud.

Sec. 18 applies to three classes of cases, *viz.* :—

Three classes of cases of fraudulent concealment.

1. Where the cause of action or the right to sue is concealed from the plaintiff by the fraud of the defendant.

2. Where the title on which the right to sue is founded is so concealed.

3. Where any document necessary to establish such right is so concealed.

Sec. 18 does not apply unless there has been fraudulent concealment by the defendant of the plaintiff's right to sue, of his title, or of some necessary document.

Suits.

The section is equally applicable to cases where (1) a right to make an *application* or (2) the title on which such right is founded, or (3) a document necessary to establish such right, has been fraudulently concealed by the opposite party. (See Mohendro *v.* Gopal, I L. R., 17 Calc., 769, F. B.)

Applications.

As regards the first two classes of cases, the date of the statutable cause of action is the date when the fraud first becomes *known* to the plaintiff (or the person from or through whom he derives his right to sue). In the third class of cases, the date of the statutable cause of action is the date when the plaintiff (or the person from or through whom he derives his right to sue) first has the *means* of producing the document or compelling its production. In the first two classes of cases, limitation runs from the date when the fraud first became known, not from the time when, with reasonable diligence, it might have been first known or discovered. In this respect, the Indian law differs from sec. 26 of 3 and 4 Will. IV, c. 27. (Compare Sir James Colvile's first Bill for the limitation of suits with his amended Bill of 1859). But although want of diligence on the part of the plaintiff does not necessarily deprive him of his privilege under sec. 18, the Court may, from the existence of the means of knowledge of the fraud, find as a fact that the plaintiff had actual knowledge of it. (See Bibee Solomon *v.* Abdool, 8 C. L. R., 184 ; and p. 231, *supra*).

Knowledge of fraud in 1 and 2.

Means of production in 3.

Means of knowledge.

A mere suggestion that the plaintiff has been defrauded does not amount to *knowledge* of the fraud. Evidence that some clues and hints reached the plaintiff, which perhaps, if rigorously and acutely followed up, might have led to a complete knowledge of the fraud, is not sufficient specially if it appears that the defendant prevented the plaintiff from seeing accounts which he desired to see. (Rahimbhoy *v.* C. A. Turner, I. L. R., 17 Bom., 341, at p. 347, P. C.) In suits for

Some clues and hints, not sufficient.

Where may plaintiff be fixed with *constructive* knowledge.

money misappropriated by an agent employed for the collection of rents, where fraudulent accounts have been rendered by the agent, the Court having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, may *infer* a knowledge of the agent's fraud where the *means of knowledge* first come, or have for a reasonable time been, within the plaintiff's reach, or in other words may hold the plaintiff fixed with *constructive* knowledge of the fraud. (See Nilmoni *v.* Nilu, I. L. R., 20 Calc., 425, and the cases cited therein. See also notes under art. 95). In the case of concealed documents, it is expressly enacted that time is to run (not from the date of the discovery of the document, but) from the date when the plaintiff first had the means of producing it or compelling its production.

Clear and definite knowledge of fraud.

Where the defendant being guilty of the fraud or accessory thereto has obtained property thereby in order to make limitation operate, the burden of proof is on him to shew that the plaintiff had clear and definite *knowledge* of those facts which constitute the fraud, for more than the period of limitation. (Rahimbhoy *v.* C. A. Tuner, I. L. R., 17 Bom., 341, P. C.) Where the plaintiff alleges that the fraud first became known to him *within* the period of limitation and gives *primâ facie* evidence of his case, it is for the defendant to shew, if he pleads limitation, that the plaintiff had clear and definite knowledge of the fraud at a time which is *too remote* to allow him to bring the suit. (See pp. 94-96, *supra*, and 3 Mad. L. Journal, p. 194).

Onus on defendant.

Sec. 18, and art. 95 compared.

Where there is fraud in the *inception* of a grant, but not in its *concealment*, sec. 18 does not apply. (Venkateswara *v.* Shekhari, I. L. R., 3 Mad., 384, at p. 397). Where the cause of action is founded on fraud (not concealed by fraud), and the plaintiff sues for relief on the ground of fraud, limitation runs from the time when the fraud comes to be known to him. But this is so, by reason of the provisions of art. 95, and not of sec. 18.

Designed fraud.

The fraud spoken of in sec. 18 is designed fraud by which a party knowing to whom the right belongs, conceals the circumstances giving that right, *i.e.*, the title to the right to sue. The knowledge required by the section is not mere suspicion of the fraud, but *full knowledge* of such a character as will enable the person defrauded to seek his remedy in Court. Partial knowledge of the fraud, if prevented by the defendant from becoming *full* knowledge, is not sufficient. (Rahmubhoy *v.* Turner, I. L. R., 14 Bom., 408, at pp. 415, 427; I. L. R., 17 Bom., at p. 347, P. C.)

Partial knowledge.

Concealment of right to sue.

If a wrong or tortious act is done by the defendant, and he *fraudulently* takes steps to *conceal* the wrong from the plaintiff, limitation does not run against the plaintiff until he discovers the wrong. If the vendor and vendee of immoveable property intentionally and actively conceal the fact of sale from the plaintiff in order to deprive him of his right of pre-emption, time will not run against the plaintiff until he discovers the fraud practised upon him. (See Rivaz, 3rd Ed., 58). An agent receiving money for his principal, and concealing the fact from him, is guilty of fraud; and this section applies to a suit by the principal for the recovery of such money. (Hossein *v.* Syud Tussudduck, 21 W. R., 245). Here the mere concealment amounts to fraud. A plaintiff who is ousted from his estate under color of a fictitious revenue-sale in pursuance of a fraudulent contract, the fraud being so contrived as to make the plaintiff believe that he had no right of action at all, the fraud would entitle him to claim the benefit of this section. (See Dwarkanath *v.* Rajah Ajodhyaram, 21 W. R., 109). But the fraud must have been committed or abetted by the defendant. (Ramdoyal *v.* Ajoodhyaram, I. L. R., 2 Calc., 1). If the defendant, by

reason of the relation in which he stands to the plaintiff, or otherwise, is bound to give him certain information, the withholding of such information, though not an active concealment, may amount to fraudulent concealment. (See Brown, 505, 506; sec. 17, Indian Contract Act). Withholding information.

Where the plaintiff (really the legitimate son of his parents) is designedly brought up by the defendant in the belief that he is only an illegitimate son, the title on which his right to sue for the property left by his parents is founded, is concealed by fraud within the meaning of this section. (See Vane *v.* Vane, L. R., 8 Ch. App., 383). Concealment of title.

Fraudulently concealing a will from a legatee is a fraudulent concealment of his title and of a document necessary to establish his right to the legacy to which he is entitled under the will. But a document which is merely useful in evidence, is not a necessary document within the meaning of the section. (Lakminarasu *v.* Aukinid, 7 Mad., 23; see also Robert *v.* Lombard, 1 Ind. Jur., N. S., 192). The fact that a document which is not compulsorily registrable is registered may displace the allegation of concealment. (Venkateswara *v.* Shekhari, I. L. R., 3 Mad., 384, at p. 398, P. C.) Withholding copies of letters and reports with the direct purpose of throwing the plaintiff over the period of limitation may be fraudulent concealment. (Ind. Jur., N. S., 192). Concealment of document. Registration may disprove concealment.

A fraud committed by a third person does not extend the time against the defendant, unless he is accessory to the fraud, or unless he stands in the shoes of such third person. (See Ramdoyal *v.* Ajoddhea, I. L. R., 2 Calc., 1; Gopal *v.* Pesim, 1 B. L. R., 76). One person may be liable in *law* for frauds which he has not committed, but it cannot be said he is a *party* or *privy* to frauds committed even by his partner or agent unless he has *personally* in some way participated in or benefited by them. (Thorne *v.* Harde, 1894, 1 Ch., 579, 606). A person is not *guilty* of the fraud or *accessory* thereto, unless his moral complicity in the fraud is, *at least*, as great as that of a party or a privy. (*Ibid.*, p. 608). Those who claim *through* a person guilty of the fraud or accessory thereto are (with one exception) liable to be sued within the extended time allowed by sec. 18. A person claiming in good faith, and for a valuable consideration, through the person guilty of the fraud or accessory thereto is the only exception to this rule. He does not stand in the shoes of the person guilty of the fraud or accessory thereto. In a suit against such a *bonâ fide* purchaser the plaintiff cannot compute the prescribed period from the date when the fraud is discovered, or even from the date of the transfer. In such a case, time runs against the plaintiff, and in favor of the defendant, from the date of the original cause of action. (See p. 154, *supra*). The adverse possession of such a purchaser is deemed to commence from the time when the plaintiff is deprived of his property by the vendor's concealed fraud, so that the purchaser is at once protected on making his purchase if the prescribed time has expired previously to his purchase. (See Banning, 221). A donee or legatee of the perpetrator of the fraud, or even a purchaser for value if the purchase is not made in good faith, is not entitled to this protection. A *bonâ fide* purchaser for value without notice from a trustee or mortgagee is protected from the moment of his purchase even if the prescribed time has not expired previously to his purchase. (See notes to sec. 10 and art. 134). Sec. 26 of 3 and 4 Will. IV, c. 27, protects a *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of the fraud, and who at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed. The Fraud of a *third* person. "*Guilty* of the fraud or *accessory* thereto." Case of a purchaser in *good faith*, an exception.

Does *notice* disprove "good faith."

Indian Act omits to mention that the purchaser must be a purchaser without *notice* of the fraud. But as according to sec. 3 nothing shall be deemed to be done in good faith, which is not done with due care and attention, the property of which the plaintiff has been deprived by concealed fraud, can hardly be said to have been purchased in good faith from the person guilty of the fraud or accessory thereto, if the circumstances of the case are such as should put an ordinarily careful man upon an inquiry and consideration as to the infirmity of the vendor's title, or such as should call the attention of the purchaser to such infirmity of title. (See Radhanath *v.* Gisborne, 15 W. R., P. C., 24, 29). However, if acting with due care and attention the purchaser honestly believes that his vendor has a good title, the mere fact that he has notice of the infirmity of title is not (for the purpose of the Limitation Act) necessarily inconsistent with his claiming the property in good faith through his vendor. (See Maniklal *v.* Manshershi, I. L. R., 1 Bom., 269, at pp. 279, 280). It has been held in England that a purchaser who contracts through an *agent* who *knows* of the *fraud* cannot be a *bonâ fide* purchaser. (Vane *v.* Vane, L. R., 8 Ch. App., 383).

Agent's knowledge.

Allegation and proof of fraud.

When fraud is charged against the defendant, the plaintiff must set forth the particulars of the fraud which he alleges. The mere use of the general words "fraud," "deceit," "illegal and fraudulent acts," "machinations," "collusion," and so forth, is not sufficient. The particular statement of facts, taken by themselves, should be such as to imply that a fraud has actually been committed. (Gunga Narain *v.* Tiluckram, I. L. R., 15 Calc., 533, P. C.) The plaintiff must give clear proof of the fraud alleged by him (Brown, 503, 504; Venkateswara *v.* Shekhari, I. L. R., 3 Mad., 384, 397, P. C.) Fraud must be proved as laid. When one kind of fraud has been charged, another kind of fraud cannot, on failure of proof, be substituted for it. (Abdool *v.* Turner, I. L. R., 11 Bom., 620, P. C.) In a case where the plaintiff alleged that a grant which he wanted to set aside had been fraudulently concealed from him, the Privy Council held that he should have stated what was the occasion of the discovery of the fraud or the circumstances which led to it; and that as the plaintiff had been guilty of extraordinary inaction, he should have given an explanation of his conduct. (Venkateswara *v.* Shekhari, I. L. R., 3 Mad., 384, 399, P. C.)].

Sec. 19. Effect of acknowledgment in writing.

19. If, before the expiration of the period prescribed for a suit or application, in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the

time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation 2.—In this section "signed" means signed either personally or by an agent duly authorized in this behalf.

[Cf. sec. 4, Act XIV of 1859, and sec. 20, Act IX of 1871.

For a full commentary on this section, see Lecture X, pp. 277—308, *supra*.

Secs. 7, 13, 14, 18, 19 and 20 compared.

The plaintiff's disability, or the defendant's fraud (secs. 7 and 18) *prevent* the operation of limitation. Abortive proceedings by the plaintiff or the defendant's absence from British India (secs. 14 and 13) *suspend* the running of time. Acknowledgments of liability or payments by the defendant (secs. 19 and 20) *interrupt* limitation, *i.e.*, cancel the already elapsed portion of the period of limitation and allow a fresh period of limitation from the date of such interruption. (See p. 242 (note), and pp. 248 and 250, *supra*).

Requisites of acknowledgments. Stamp and Registration Acts.

A written acknowledgment in order to be valid must not contravene the provisions, if any, of the Stamp and Registration Acts. See pp. 286—288, *supra*, Sched. I, cl. 1, Act I, of 1879, and I. L. R., 15 Calc., 162 (Stamp), I. L. R., 4 Bom., 590, and I. L. R., 5 Bom., 232 (Registration). A letter written *ante litem motam*, before limitation in respect of the debt had expired, containing an allusion to the debt due to the plaintiff may be admitted as evidence of an acknowledgment although it is not stamped. Art. 1, Sched. I of the Indian Stamp Act, 1879, applies only when the acknowledgment is written with the *intention* of supplying evidence of a debt, not where the existence and amount of the original debt is at hand and readily available. (Bishambar *v.* Nand Kishore, I. L. R., 15 All., 56). An acknowledgment of a pre-existing debt contained in a deed of sale of immoveable property of the value of Rs. 100 or upwards, is admissible in evidence even if the deed of sale being unregistered is inadmissible to prove the conveyance. (Nund Kishore *v.* Ramsookhee, I. L. R., 5 Calc., 215).

Minority of acknowledger.

A written acknowledgment of liability signed by a minor is not a valid acknowledgment. (See Willins *v.* Smith, 4 El. and Bl., 180; and pp. 289, 300, *supra*. But if the defendant was a minor at the time of the acknowledgment he must prove his plea. (Hartley *v.* Wharton, 11 A. and E., 934). As an acknowledgment under sec. 19 does not operate as a promise or contract, but as a mere waiver of the time that has already run, the Editor of the Madras Law Journal doubts the correctness of the proposition that a minor cannot make a valid acknowledgment. (See 3 Mad. L. J., 102). But "the general principle of law is that a minor is not to be allowed to *do anything* to prejudice himself or his right." (Per Lord Abinger, C. B., in Oliver *v.* Woodroffe, 4 M. and W., 653). It has also been held that an *infant* married woman can *not waive* her equity to a settlement. (Shipway *v.* Ball, L. R., 16 Ch. D., 376). An infant is *not* bound by *acquiescence* or prejudiced by *laches*. (Simpson on Infants, 2nd Ed., 57).

The acknowledgment must be made before the expiration of the prescribed period of limitation. (See pp. 289-291, *supra*). There may

Acknowledgment of unbarred debts, and promise to pay barred debts.

be a valid *promise* in writing to pay a barred debt. (Sec. 25, Contract Act). If at the date of an acknowledgment of debt, the suit was barred by limitation, the plaintiff must fail unless he shews that the acknowledgment of the balance due to the plaintiff was an "account stated" in the *true* sense of the term, *i.e.*, unless the acknowledgment amounts to a *promise* to pay the balance. (See Vittalsha *v.* Sheodin, 2 Cent. Pro. L. Rep., 40. See notes under art. 64). An unsatisfied judgment-debt, if barred by limitation, may be adjusted *out of Court*; a bond for its payment may be executed without the sanction of the Court under sec. 257A of the Code of Civil Procedure. (Shripatrav *v.* Govind, I. L. R., 14 Bom., 390).

"Period prescribed."

The section applies to periods of limitation prescribed by the tricolumnar Schedule of this Act, as well as by local or special laws. (Parbuttinath *v.* Tejmoy, I. L. R., 5 Calc., 303; Rama Raw *v.* Venkatisa, I. L. R., 5 Mad., 171, F. B. See also pp. 217, 219, *supra*). The term "the period prescribed" used in Acts IX of 1871 and XV of 1877 refers to the period prescribed by the Act which governs the suit, and not the period prescribed by the law in force at the date of the acknowledgment. (Mukkanni *v.* Menan, I. L. R., 5 Mad., 182, at p. 184).

Applicability of sec. 19.

The section applies to suits, as well as to applications, and to acknowledgments in respect of debts as well as in respect of any other property or right. (See pp. 277, 278, 299, and 300, *supra*).

Other requisites.

The acknowledgment of liability must be made in writing, and the writing must be signed. (See pp. 282-286, *supra*. See also Ramasami *v.* Muttusami, I. L. R., 15 Mad., 380). According to Ayyar, J., even a deposition given and signed by a party as a witness in a suit is a writing within the meaning of sec. 19. (Venkater *v.* Partha, I. L. R., 16 Mad., 220). On this subject, see 3 Mad. L. J., 96. A draft will not regularly subscribed is not sufficient. (See I. L. R., 15 Mad., 380; 2 Mad. L. J., 436). The identity of the right, the name of the person entitled to the right, and the date of the acknowledgment need not appear on the face of the writing, but may be proved by oral evidence. (See p. 283). Sealing and marking may be equivalent to signing. (See p. 284). The signature may appear in any part of the writing. (See p. 285, *supra*). But compare I. L. R., 15 Mad., 380, and see 2 Mad. L. J., 436).

Although it is not necessary that the acknowledgment should be addressed to the plaintiff, there must be an acknowledgment of *liability to the plaintiff*. (Mylapore *v.* Yeo, I. L. R., 14 Calc., 801, P. C.) And the acknowledgment of liability must be *communicated* to some person or other. (See p. 307, *supra*, and I. L. R., 10 Bom., 71).

An acknowledgment of debt must be an acknowledgment of the debt as such, and must involve an admission of a subsisting relation of debtor and creditor; and a consciousness and an intention of continuing such relation, until it is lawfully determined, must also be evident. (Venkata *v.* Partha, I. L. R., 16 Mad., 220. See also Dharma *v.* Govind, I. L. R., 8 Bom., 99, at p. 102).

Terms of an acknowledgment.

As to what is in terms a sufficient acknowledgment, see pp. 292—300, *supra*. It has been held in England that the following words written by the debtor contain a sufficient acknowledgment: "I beg of you to send in your account" (Quincey *v.* Sharpe, 1 Ex. Div., 72). A right to recover from the defendant a balance, which the plaintiff alleges to be due to him on the accounts between them, is sufficiently acknowledged if the defendant admits that the accounts must be taken, and that he is liable, in respect of plaintiff's right, to pay the balance, if any. It is not necessary that the defendant should

admit that any balance is or shall be found due by him. (Sitayya *v.* Rangareddy, I. L. R., 10 Mad., 259). But allowing the plaintiff to send in his bills, and promising to enquire into their merits do not amount to an acknowledgment of liability. (Doya Narain *v.* Secretary of State, I. L. R., 14 Calc., 256). Where the plaintiff relied on a document which was in these terms: "if I have to stump up, the sooner it is done the better, though it would go against all my ideas of justice and right," it was held that this was an acknowledgment of a demand which in the *opinion* of the person making the acknowledgment was entirely *unjust* and could not amount to an admission that the debt was due within the meaning of Act XIV of 1859. (The Uncovenanted Service Bank *v.* Marshall, 6 N. W. P., 306).

Promise to enquire into merits of plaintiff's claim.

Opinion that claim is unjust.

Sec. 19 does not provide that the acknowledgment should mention the *name* of the creditor or mortgagee. An admission by the mortgagor in his will that he held the disputed property as a mortgagee may be treated as a sufficient acknowledgment of the plaintiff's right to redeem, if the mortgagor's executor fails to show that there was any other mortgage to which the testator could have referred. (Uppi Haji *v.* Mammavan, I. L. R., 16 Mad., 366).

Creditor's name need not appear.

The acknowledgment of liability must be a *conscious* admission of an existing liability in respect of the *identical* property or right in respect of which the suit or application is afterwards made. (See pp. 292, 295, *supra*, and I. L. R., 6 Mad., 182). There are two apparent exceptions to this rule. Where the debtor draws a hundi in favor of his creditor, in consideration of the debt due by him, and the hundi being dishonored by the drawee, the creditor sues the debtor for the original debt, the debtor's acknowledgment of liability under the hundi is, on a reasonable construction of sec. 19, a sufficient acknowledgment of liability for the original debt (Raman *v.* Vairavan, I. L. R., 7 Mad., 392). It has also been held that an acknowledgment of liability as a surety only (by a person who signed a joint and several bond apparently as *principal*) is sufficient to keep alive a liability as a principal debtor. (Uncovenanted Service Bank *v.* Grant, I. L. R., 10 All., 93).

Conscious admission of *identical* right. Two apparent *exceptions.*

Sending in a claim to an executor or administrator is not equivalent to bringing an action, nor does it, even with the advertisement to bring in claims, amount to an acknowledgment. (Warburton *v.* Stephens, 43 Ch. D., 39). (See pp. 290, 298, *supra*).

Advertisement to bring in claims.

As to acknowledgments marked "without prejudice," see p. 292, *supra*.

"Without prejudice."

The creditor or claimant is entitled to a fresh period of limitation according to the nature of the liability which exists at the date of the acknowledgment. (See p. 308, *supra*). (As to the effect of a series of acknowledgments, see I. L. R., 6 Calc., 340, and p. 308, *supra*).

Effect of acknowledgments.

The defendant's acknowledgment of liability to a minor creditor or claimant gives the latter the full period of limitation from the date of the acknowledgment. The minor is not bound to sue within three years of attaining his majority. (See pp. 248, note, and 267, *supra*).

Acknowledgment to minor creditor.

Suit to recover principal and interest due on a registered bond executed by defendants in favor of the plaintiff's father. The date of the bond was 20th June 1870; the principal sum was payable on 20th June 1872; the plaintiff's father died in 1875; the defendants made acknowledgments of their liability in 1876 and 1877; the plaintiff came of age in 1885, and this suit was brought on 11th

Effect of acknowledgment to minor creditor.

August 1887: *held*, the suit was not barred by limitation. (Venkataramayyar *v.* Kothandaramaysar, I. L. R., 13 Mad., 135). In this case a right to sue had accrued and time had begun to run against plaintiff's father, and therefore against plaintiff, before the dates of the acknowledgments. The acknowledgments were given when he was a minor, and he was entitled under sec. 19 to a *new* period of six years from the date of the last acknowledgment in 1877. Under sec. 7 the plaintiff was further entitled to bring his suit within three years of his attaining his majority. Time, which had commenced to run in 1872, terminated on the date of the acknowledgment, and a *new* period of six years commenced to run from that date. This acknowledgment was not, and could not, be treated as a subsequent *disability* stopping the running of the old period within the meaning of sec. 9. In order that a plaintiff might claim the protection of sec. 7, Act IX of 1871, it was necessary that he should be a minor at the date when the right to sue accrued. But under sec. 7 of Act XV of 1877 the plaintiff is protected if he was a minor at the time from which the period of limitation is to be reckoned, such as the date of an acknowledgment under sec. 19 given to him during his minority. (See pp. 261, 262, *supra*).

Acknowledgment by absent defendant.

An acknowledgment of liability made by a person, who is absent from British India, cancels the already elapsed portion of the ordinary period of limitation, and gives the creditor or claimant a fresh period from the date of the acknowledgment. If the defendant continues to remain abroad, the plaintiff, it is apprehended, is entitled to an exclusion of the period of such continued absence, in the computation of this *fresh* period of limitation. Dr. Stokes, in his Anglo-Indian Codes, Vol. II, p. 950, suggests that secs. 19 and 20 should expressly provide for the case of an acknowledgment or payment made in favor of a person under disability, or by a person absent from British India.

By a person *other* than the defendant.

A guardian has no authority to bind the estate of his ward by admissions of previous transactions. (Suruj Mookhi *v.* Bhagwati, 10 C. L. R., 377, P. C.) An acknowledgment of liability made by the guardian of an infant does not renew the period of limitation under sec. 19. (See p. 300, *supra*, and I. L. R., 13 Calc., 292). But an acknowledgment by the managing member of a joint Hindu family signed *before* the right is barred by limitation, binds the whole family. (See p. 306, *supra*, and I. L. R., 5 Mad., 169, F. B. See also Bhasker *v.* Vijalal, I. L. R., 17 Bom., 512). Although a managing member of a joint Hindu family cannot as such revive a barred debt as against his co-parceners, it is competent to the widow of a deceased member of the family, who represents the inheritance for the time being, and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts though they were barred at the time of its execution. When, therefore, the managing member of an undivided Hindu family, after the death of the widow, sold family property for the purpose of discharging such a mortgagee: *held*, that the sale was binding on the co-parcenary. (Kondappa *v.* Subba, I. L. R., 13 Mad., 189).

As to the authority of agents generally, see pp. 304, 305, *supra*.

Secondary evidence of acknowledgments.

An acknowledgment of liability being a matter required by sec. 19 to be reduced to the form of a document or writing, no evidence can be given of it except the document itself. Sec. 91 of the Evidence Act, I of 1872, does not exclude secondary evidence of the contents of the writing, if it is lost or not forthcoming. But the last ten words of cl. 2, sec. 19 of the Limitation Act of

1877, would be of no use whatever if they did not exclude secondary oral evidence of the contents of a written acknowledgment, which is not forthcoming. (See I. L. R., 12 Bom., 268; *contra*, I. L. R., 12 Calc., 267). See pp. 280, 281, *supra*. The Madras High Court agrees with the Calcutta High Court in holding that sec. 19, Act XV of 1877, does *not* exclude secondary evidence in cases where such would be admissible under sec. 65 of the Evidence Act. (Chathu *v.* Viraryan, I. L. R., 15 Mad., 491).

A new period of limitation shall be computed from the time of the acknowledgment. Under sec. 3, Act I of 1868, and sec. 12 of this Act, the date of the acknowledgment is excluded in computing the new period. Similarly the date of the payment under sec. 20 is excluded in the computation of the new period allowed by that section. (See Stokes' Anglo-Indian Codes, Vol. II, p. 971.)] New period how computed.

20. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent *duly* authorized in this behalf, Sec. 20. Effect of payment of interest as such.

or when a part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, Effect of part-payment of principal.

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section. Effect of receipt of produce of mortgaged land.

[Cf. sec. 21, Act IX of 1871.

For a full commentary on this section, see Lecture XI, pp. 259—270, *supra*.

For the meaning of the words "interest" and "debt," see pp. 314, 316, *supra*. Interest must be paid as such, *i.e.*, *qua* interest. (See pp. 316—317, and I. L. R., 3 Bom., 198).

The Illustrations to sec. 50 of the Indian Contract Act, IX of 1872, indicate four different ways in which a debt may be paid if the creditor so please. Another common mode of payment is, when the creditor desires the debtor to pay the money to some third person; another, where the debtor agrees to give a promissory note, or to accept a bill for the amount. (Cunningham and Shephard's Contract Act). Oral evidence of that which constitutes the payment (see cl. 4, sec. 20, Act XV) is not sufficient when the payment is a payment of a part of the principal. Thus, where the creditor accepts some of the debtor's goods in reduction of the debt, the delivery of the goods operates as a part payment (Illus. *c*, sec. 50, Act IX of 1872), but if the fact of this payment does not appear in the handwriting of the debtor, it cannot renew the period of limitation. A cheque being only an order for payment, the mere endorsement of a cheque by the debtor to the creditor is not evidence of *payment*, in *writing* (I. L. R., 9 Mad., Modes of payment. Endorsement of cheque.

Acceptance and indorsement of bills.

271 ; p. 320, *supra*, and notes to art. 58). The acceptance (in writing) by a debtor of a bill drawn upon him by the creditor is probably sufficient. But the delivery to the creditor of a bill drawn by the debtor on a third person, though it may operate as a payment, is not

Sums realized, not paid.

sufficient under cl. 4 of sec. 20. Sums realized by the sale of the debtor's property in execution are not sums *paid*. (See p. 318, *supra*). Where a debtor makes a payment because he is *bound* to do so under a *judgment* recovered by the creditor, such payment does not raise the inference of a promise to pay the remainder and is insufficient to take a debt out of the Statute in England. (Morgan *v.*

Carrying forward of amount in books.

Rowlands, L. R., 7 Q. B., 493). The mere carrying forward of the amount of a loan with the *interest* due thereon in the debtor's books, though such entry of interest is made in the presence of the creditor, does not amount to a *payment* of interest. (Iccha *v.* Natha, I. L. R., 13 Bom., 338).

Written authority not necessary.

An agent may be "duly authorized" although he holds no *written* power or authority. (See pp. 305, 306, *supra*). An agent may be impliedly authorized within the meaning of sec. 20 of the Limitation Act to make a payment of interest or principal before the expiration of the period prescribed. (Birjmohun Lall *v.* Rudra Perkash Misser, I. L. R., 17 Calc., 944).

Effect of payment of interest.

The principal and interest constituting one demand or claim, part-payments or payments of interest keep alive the whole claim to principal and interest. (See p. 317, *supra*). It has been held in England, that payment of interest *pursuant* to a *judgment* in an action brought to recover *interest* only, does *not* prevent the statute from being a bar to a subsequent action for the recovery of the *principal* debt itself. (Morgan *v.* Rowlands, L. R., 7 Q. B., 493 ; Somerset *v.* Earl Poulett, [1894], 1 Ch., 231, at p. 264). Cf. notes under art. 63. Dr. Stokes suggests that the Legislature should declare the effect of part-payments of principal on the claim for interest.

Of interest as *damages*.

In England as well as in India a payment of interest *qua* interest interrupts the operation of limitation. (Somerset *v.* Earl Poulett, 1894, 1 Ch., 231, at p. 268). And it has been held in England that payment of interest at the stipulated rate after the due date—there being no covenant for payment of interest *post diem*, though in the nature of *damages*, keeps alive the debt. (See Allison *v.* Frisby, 43 Ch. D., 106, and p. 316, *supra*).

Mortgaged land.

Land covered by an inoperative deed of mortgage (*e.g.*, where a deed of mortgage required by law to be registered is unregistered), is not "mortgaged land." (Pichandi *v.* Kandasami, I. L. R., 7 Mad., 539, and p. 313, *supra*).

Produce of land.

"Produce of such land" in the fifth clause includes the rent of such land. As to constructive payments, see pp. 312, 318, *supra*. As to the effect of a series of payments, see I. L. R., 11 Mad., 218, and p. 308, *supra*.

Judgment-debt.

Following the *ratio decidendi* in Ramhit *v.* Satgur, I. L. R., 3 All., 247, F. B., it has been held by the Allahabad High Court that part-payments of judgment-debts fall within the terms of sec. 20 (Janki *v.* Ghulam, I. L. R., 5 All., 201). See also Muhammad *v.* Payag, I. L. R., 16 All., 228 ; and p. 315, note 4, *supra*.

Writing where required.

The mere fact of a payment on account of *interest* is of itself sufficient for the purposes of sec. 20. The fact of a payment of a *part* of the principal must appear in the handwriting of the debtor or his agent.

It has been held by Innes and Kernan, JJ., that all that is required by sec. 20 is, that the fact of the payment should appear in the handwriting of the person making the same. It is not necessary that the appropriation of the payment to principal should appear in writing. That may be made to appear otherwise. The endorsement of payment on a bond need not shew that the payment is made as a part-payment of the principal of the debt (Jada Ankamma *v.* Nadimpallee Rama, I. L. R., 6 Mad., 281). But in Mackenzie *v.* Tiruvengadathan (I. L. R., 9 Mad., 271, at p. 273), Ayyar and Brandt, JJ., say: "The Act requires that the fact of payment, and that such payment was a part-payment, should appear in writing." Dr. Stokes suggests that the Legislature should insert the words "as such" after "paid" in the second clause of sec. 20. (Stokes' Anglo-Indian Codes, Vol. II, p. 950, and p. 316, *supra*).

Appropriation of payment.

An acknowledgment under sec. 19 must be written and signed before the expiration of the prescribed period of limitation. A payment under sec. 20 must also be made before the expiration of such period. But in the case of a part-payment of the principal of a debt, though the fact of the payment must appear in writing, it is not necessary that such writing should be made before the expiration of the period of limitation. Where, therefore, an entry of the payment in an account is made by the defendant *after* the expiration of the prescribed period, the suit may not be barred if it appears from such entry that the part-*payment* was made *within* the prescribed period. (Venkata *v.* Appu, I. L. R., 17 Mad., 92.)]

Subsequent entry of previous part-payment sufficient.

21. Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them.

Sec. 21. One of several joint contractors, &c., not chargeable by reason of acknowledgment or payment made by another of them.

[Cf. the concluding portion of sec. 4, Act XIV of 1859, and sec. 20, Expl. II, Act IX of 1871.

For notes on this section, see pp. 279, 302-304, 313, *supra*.

The plaintiff may, notwithstanding this section, shew that the joint contractor, partner, executor, or mortgagee, who signed the acknowledgment or made the payment, was acting as the duly authorized agent of the other parties. The meaning of the word "only" in sec. 21 is that it must also be shewn that the partner, &c., signing the acknowledgment had authority, express or implied, to do so. In a going mercantile concern every partner is presumed to be the agent of every other (Premji *v.* Dossa, I. L. R., 10 Bom., 358; Gadu *v.* Parsotam, I. L. R., 10 All., 418).

"Only."

It has been held in England that, as long as a partnership continues, each partner is an agent for the purpose of making an acknowledgment under the Statute of Limitations. But after a partnership is dissolved, one of the late firm cannot, by his act or admission, involve his co-partner in any new liability, and a payment made by a continuing partner will not revive a debt to the detriment of the retiring partner (Watson *v.* Woodman, L. R., 20 Eq., 721, 730; Banning, 80, 208). It should, however, be observed that the provisions of the English law on this subject (9 Geo. IV, c. 14, sec. 1; and 19 and 20 Vict., c. 97, sec. 14) do not expressly refer to partners, as the Indian law (sec. 21) does. In Khoodeeram *v.* Kishunchand, 25 W. R., 145, a Division Bench of the Calcutta High Court held that the corresponding

Going and dissolved mercantile partnerships.

provisions of Act IX of 1871 (sec. 20, expl. 2) did not apply to cases where one partner, by the ordinary rules of partnership, was able to bind his co-partner. Every partner of a firm, which is of a mercantile character, is deemed to be duly authorized to borrow money, and draw and accept bills in the name of the firm. (See sec. 251, Indian Contract Act, and Premabhai *v.* Brown, 10 Bom., 319, 322). The members of a carrying company, or a mining company, or of a firm of attorneys, have no such implied authority. (*Ibid.*)

Sureties and principal debtors.

If secs. 20 and 21 apply to the case, a payment by the debtor does not keep alive the action against the surety, nor can a payment by the surety keep alive the debt against the principal debtors. (See Allison *v.* Frisby, 43 Ch. D., 106). The principal debtor, and the surety are, at the best, joint contractors, and under sec. 21, one joint contractor is not bound by an acknowledgment or payment made by another. But under art. 146 of Act XV of 1877 a payment of interest by the mortgagor's surety or by any one liable to pay is so far binding on the mortgagor that the mortgagee gets a fresh start from the date of payment, not only against the surety but also against the mortgagor. Sec. 21 does not appear to be applicable to payments referred to in art. 146.

Joint mortgagees.

An acknowledgment by one of two *joint* mortgagees is *wholly* insufficient to remove the bar of limitation even as regards the acknowledging mortgagee. (See Bhogilal *v.* Amritlal, I. L. R., 17 Bom., 173; p. 303, *supra.*)]

Sec. 22. Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff:

Proviso where original defendant dies.

Provided also, that when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

[Cf. sec. 22, Act IX of 1871.

See p. 237, *supra*, and arts. 175A, 175B, 175C.

Adding new appellants or respondents.

This section speaks of suits, plaintiffs, and defendants. It does not say anything about appeals, appellants, and respondents. Section 32 of the Code of Civil Procedure, which provides for adding parties in the Court of first instance, contains an express reference to this section; but sec. 559 of the Code, which provides for the addition of respondents, contains no such reference. If sec. 22 of Act XV of 1877 were applicable to sec. 559 of the Code, it would be in the power of the appellant to exclude the discretion of the Court by filing his appeal on the last day allowed by the Limitation Act for that purpose (Manickya *v.* Boroda, I. L. R., 9 Calc., 355, 362). Under Acts VIII and XIV of 1859 also, the Appellate Court had a similar discretion in the matter of adding a fresh respondent to the record. (Showdamonee *v.* Ram Roodro, 8 W. R., 367). In a case where the liability of the two defendants was *joint*, and the plaintiff, by an oversight, appealed against the first defendant only, and the second defendant was made

a respondent after the time allowed for appealing against him, it was held that sec. 22 did not bar the appeal, even so far as it affected the second defendant (The Court of Wards *v.* Gaya Persad, I. L. R., 2 All., 107, 109). But in a case where the plaintiff sued two defendants *jointly and severally* for certain monies, and obtained a decree against the first defendant only, and the first defendant having appealed against the plaintiff, the District Judge made the second defendant a party to the appeal, after the time for appealing against him had expired, it was held by the Allahabad High Court that sec. 582 of the Code of 1877, read with sec. 32 of the same Code, made sec. 22 of the Limitation Act applicable to the case (Ranjit *v.* Sheo Persad, I. L. R., 2 All., 487). The learned Judges, however, made no reference in this case to sec. 559 of the Code. Besides, it is now evident from the amended sec. 582 of the Code, 1882, that the terms "plaintiff" and "defendant" in sec. 32 of the Code do *not* include "appellant" and "respondent." The power of an Appellate Court to make a person respondent under sec. 559 of the Civil Procedure Code is not affected by the Limitation Act. Sec. 559 is independent of sec. 32, and a new respondent may be added even after the time for appealing against him has expired. The fact of any person making an application for the addition, out of time, cannot take away from the Court a power given to it to act at any time either upon or without application. (Sohna *v.* Khalak, I. L. R., 13 All., 78. Oriental Bank *v.* Charriol, I. L. R., 12 Calc., 642). In a case where a principal and a surety were originally sued, and the plaintiff appealed against the surety only, it was held that the discretionary power of directing a person to be made a respondent conferred on the Appellate Court by sec. 559 of the Code was not limited by sec. 22 of the Limitation Act (Manickya *v.* Boroda, I. L. R., 9 Calc., 355). But where a defendant, having an unappealed decree in his favor, is not interested in the result of the plaintiff's appeal against a co-defendant, sec. 559 of the Code does not empower the Court to add him as a respondent to the appeal (Atmaram *v.* Balkishen, I. L. R., 5 All., 266).

Power of Appellate Court not affected by Limitation Act.

Exception.

In another case (The Corporation *v.* Anderson, I. L. R., 10 Calc., 445) where, on the suggestion of the original defendant that another person was liable, the Court made him a defendant, but the suit being decreed against the original defendant, that defendant appealed against the plaintiff without making his co-defendant a respondent, it was held that the plaintiff could not, after the period for appealing from the decree had elapsed, be allowed to appeal against the added defendant, unless he satisfied the Court under sec. 5 that he had sufficient cause for not presenting a substantive appeal within that period. The question whether the second defendant could be added as a respondent to the original appeals was not considered, probably because, in the appeal against the plaintiff by the original defendant, the liability of that defendant could not be shifted to his co-defendant.

Under the Civil Procedure Code when the name of a defendant is added by order of Court, the proceedings as against him are deemed to begin only on the service of a summons upon him. (See sec. 32, Act XIV of 1882; Subodini *v.* Cumar Ganoda, I. L. R., 14 Calc., 400, 401). No person can be added as a plaintiff without his own consent thereto. (Sec. 32, Act XIV of 1882). If the plaintiff added or substituted is a *new* plaintiff within the meaning of sec. 22 of this Act, the rule laid down by the section applies to him as well as to an added defendant. It has been held by the learned Judges in Subodini's case cited above, that "the change of parties as plaintiffs under sec. 27 of the Civil Procedure Code, does not affect the question of limitation." Sec. 27 of the Code, it should be noted, applies only where through a *bonâ fide* mistake the suit is not instituted in the name of

Change of plaintiffs or defendants.

the right plaintiff, and the Court substitutes or adds the name of another plaintiff. Pigot and Banerji, JJ., are inclined to hold that if the suit in its original form is properly framed, and one of the joint claimants is properly made a party defendant, the *change* of that person from a defendant into a plaintiff under sec. 32 of the Civil Procedure Code does not make him a *new* plaintiff and does not bring the case within sec. 22 of the Limitation Act. (Jibanti *v.* Gokool, I. L. R., 19 Calc., 760).

Substitution or addition of *new* parties.

Where a plaintiff brought a suit as assignee of a mortgage, and was subsequently allowed to amend his plaint and sue in his own name, *and* as attorney of the original mortgagee, though the mortgagee *by* his attorney was legally a *different* person from the attorney *personally*, it was held by Sargent, J., in the Court of first instance that there was no substitution of a new plaintiff (Ganapat *v.* Adarji, I. L. R., 3 Bom., 312). Mr. Starling says, this ruling was not accepted by the Appellate Court. The plaintiff in the amended plaint was the assignee in his *own* name, *and* as *attorney* for the assignor. But a *new* plaintiff, *viz.*, the assignor was (in substance and in reality) added by the amendment. (See Starling, 2nd Ed., p. 84). In Saminadha *v.* Muthayya, 2 Mad. L. J., 119, I. L. R., 15 Mad., 417, Aiyar and Best, JJ., however, partially relied on the authority of that case, and held that sec. 22 did not apply where a new person was not brought in, and that amending a plaint and seeking *to* make the original *defendant* liable on a ground not alleged in the plaint, though such amendment had been made after expiry of the prescribed period, did not make the suit liable to be dismissed as barred by limitation. In this case the son of a deceased trustee of a temple was originally sued as the representative of the temple, for the recovery of some unpaid purchase-money, and subsequently the plaintiff accepting the defendant's contention that the purchase was made on behalf of his own family and not on behalf of the temple, sought to make the defendant liable as the personal representative of the deceased trustee in his *individual* capacity. But see an unreported judgment of Gibbes and Melvill, JJ., *infra*. In a suit for rent brought in the name of the landlord's authorized manager, it has been held, that the substitution of the landlord as plaintiff under sec. 27 of the Civil Procedure Code has not the same effect as the adding of a new defendant under sec. 32 of the Code. (Subodini *v.* Cumar Ganoda, I. L. R., 14 Calc., 400). Here the authorized manager, and the landlord were legally one and the same person, and the suit had been instituted in the *name* of the *wrong* plaintiff. But section 22 of this Act would have applied to the case if the substituted plaintiff were a new plaintiff within the meaning of this section.

Different *capacities* of the same man.

Correction of misdescription—not substitution of new party.

The substitution of the name of the President of a Committee for that of their Secretary, neither of the officers being personally liable, is not a substitution within the meaning of this section (Manni *v.* Crooke, I. L. R., 2 All., 296). A case of misdescription should be distinguished from a case of nonjoinder. If an action is brought in the name of a *firm by* its manager, and the manager does *not* sue in his own name, the names of undisclosed partners may be subsequently added under sec. 27 of the Civil Procedure Code, and the subsequent addition will not bring the case within sec. 22 of Act XV of 1877. (Kasturchand *v.* Sagarmel, I. L. R., 17 Bom., 413).

Correcting a misdescription by adding the names of all the partners of the firm against which the suit is brought is not adding new defendants within the meaning of sec. 22 (Pragilal *v.* Maxwell, I. L. R., 7 All., 284). But where a defendant, who has been sued in his representative capacity, is (by an amendment of the plaint, supposing

such amendment is allowable) afterwards sued in his individual capacity, and the suit is then barred, the suit against the defendant in his individual capacity cannot be held to have been instituted on the date of the presentation of the original plaint. (Per Gibbs and Melvill, JJ.) See Branson's Digest of Unreported Bombay Cases, p. 203. But compare I. L. R., 15 Mad., 417.

Case of joint promisees, or co-owners added *as plaintiffs* after expiry of time.

Where some only of several joint promisees sue to enforce a joint contract, and the other promisees are made co-plaintiffs after the expiry of the period of limitation, the whole suit must be dismissed, provided the defendant has objected to the nonjoinder in proper time. (Ramsebuck *v.* Ramlal, I. L. R., 6 Calc., 815 ; Kalidas *v.* Nathu, I. L. R., 7 Bom., 217 ; Umasundari *v.* Ramji, I. L. R., 7 Calc., 242, and Krishna *v.* The Collector, I. L. R., 10 Mad., 44, 48). A Court may under sec. 32 of the Code of Civil Procedure add a party *necessary* to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added. (Imamuddin *v.* Liladhar, I. L. R., 14 All., 524). The same rule would apply to some of several heirs of a single promisee, for, it has been held by a Full Bench of the Allahabad Court (Mahmud, J., dissenting) that the heirs of the obligee must enforce the promise in its entirety, and cannot sue for their shares separately. (Kandhyalall *v.* Chunder, I. L. R., 7 All., 313). The rule applicable to joint promisees is also applicable to co-owners of property. (Balkrishna *v.* The Municipality, I. L. R., 10 Bom., 32 ; but cf. Harendra *v.* Moran, I. L. R., 15 Calc., 40, 46, and see p. 269, note, *supra*). In such cases of nonjoinder of plaintiffs, amendments are practically useless in British India, if they are made after the period of limitation (I. L. R., 6 Calc., 823). According to Wilkinson and Handley, JJ. (see 3 Mad. Law Journal Reports, 176), there is no authority for holding that sec. 22 of the Limitation Act applies when the Court acting of its own motion under sec. 32, Civil Procedure Code, orders that the defendant who is *already* on the record be made a plaintiff ; and I. L. R., 6 Calc., 815, does not apply to such a case. Where three persons become partners under one and the same agreement, a suit for partnership accounts by one against another of the partners only is clearly defective, and if the third partner (although he is only a *sunna bhaghi gomastha*) is added as a defendant after the expiry of the period of limitation, the whole suit must be dismissed. There is no distinction in principle between the case of one who ought to have been originally a plaintiff, and the case of one who ought to have been originally a defendant. (Ramdoyal *v.* Junmenjoy, I. L. R., 14 Calc., 791, 794).

Co-partners added as *defendants* after time.

Naming other joint-creditors as co-plaintiffs in the plaint.

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. Three suits for money were filed by one of three joint-creditors, the others being named as co-plaintiffs with him in the plaints, which he alone signed and verified. An order was made by the Court after the filing of the plaints that one of these joint-creditors should be added as a co-plaintiff as if he had not been on the record already. If the date of that order had been the date of suit brought, limitation under Act XV of 1877, Sched. II, Art. 67, would have applied ; but it was held that all the joint-creditors became plaintiffs when the plaints were filed, the order adding parties being inoperative, and that the suits when instituted were not defective for want of parties. (Mohini Mohun Das *v.* Bungsi Buddan Saha Das, I. L. R., 17 Calc., 580, P. C.)

Kurta and other members.

Where the defendant entered into a contract of loan with the *kurta* of a Hindu family, and the *kurta* sued to enforce the contract, it was held that the addition as parties of other members of the family interested in the loan after the prescribed period had expired did not

prevent the Court from giving the *kurta* a decree for the whole amount (Radha Churn *v.* Mohesh Chunder, 3 Shome's Reports, p. 99). This decision would not be opposed to the ruling in Ramsebuck's case, if it was found as a fact that the contract was in fact made between the defendant and the *kurta* only, for in that case the joinder of the other members was only a misjoinder. (See I. L. R., 6 Calc., 815, 824).

Change of properly made defendant into plaintiff.

It has been held by Wilkinson and Handley, JJ., that where one of the joint promisees refuses to join the others, and is made a *defendant* from the *beginning*, the suit of the others for their shares may be decreed if the *Court* of its own motion (even after the limitation period) makes that defendant a co-plaintiff under sec. 32 of the Civil Procedure Code. (Khadir *v.* Moideen, 3 Mad. L. J., 176 ; I. L. R., 17 Mad., 12).

It is only when the plaintiff can show that those entitled to join with them have refused to join or have otherwise acted prejudicially to their interests that they are entitled to sue alone, and to make the reluctant or refusing co-sharers defendants in the suit. (Luke *v.* South K. H. Co., L. R., 11 Ch. D., 121 ; Dwarka *v.* Tara, I. L. R., 17 Calc., 160). When a co-owner or joint promisee is made a party defendant simply because he is sojourning at a distant place, he is made a defendant in violation of this rule. The transfer of *such* a defendant into the category of plaintiff introduces a *new* plaintiff and brings the case within sec. 22. (Jibante *v.* Gokool, I. L. R., 19 Calc., 760).

Case of co-promisors and tortfeasors made defendants after time.

In the case of joint promisors, any *one* of them may be sued for the performance of the whole promise. (Sec. 43, Act IX of 1872). A similar rule applies when a tort is committed by two or more persons. (I. L. R., 3 Calc., p. 362 ; and p. 303, note 6, *supra*). Where certain property was in the possession of several tortfeasors, and plaintiff at first sued to recover from one only, and made the other defendants after the limitation period had expired, it was held that the suit was barred as against the *added* defendants only. (Obhoy *v.* Kritartha, I. L. R., 7 Calc., 284). Where the original defendant is liable as a surety, and the principal debtor is added as a defendant after the expiry of the period of limitation, the suit may be decreed against the surety defendant only. (Kristo *v.* Radha, I. L. R., 12 Calc., 330). But where the plaintiff sued A to enforce a right of pre-emption, and thereby to invalidate a sale made to A and B jointly, and B was made a defendant after the expiry of the prescribed period, the Allahabad High Court dismissed the whole suit (Habibullah *v.* Achaibar, I. L. R., 4 All., 145).

When made a party.

"When he was so made a party."—These words may be read as "when he *applied* to be made a party with success," if the delay is attributable to the act of the Court. (See p. 191, *supra*). An order of the Lower Appellate Court allowing such an application after it had been rejected by the 1st Court would therefore operate *nunc pro tunc* (now for then)—Ram Krishna *v.* Ramabai, I. L. R., 17 Bom., 29.

Change of limitation law.

If the substitution or addition of parties to the record, in the Court of first instance, takes place after a new law of limitation has come into operation, the suit as regards the original parties will be governed by the old law, and as regards the new parties by the new law. (See Abdul *v.* Manji, I. L. R., 1 Bom., 295 ; see also Dayal *v.* Khatav, 12 Bom. H. C., 97, at p. 105).

Cls. 2 and 3. Addition of assignees.

The provisos in clauses 2 and 3 of this section speak only of the legal representative of a party at his death ; but it has been held that the principle of the proviso applies to the assignees of the original

parties. When the plaintiff after instituting his suit assigns his interest, it is perhaps not necessary for the assignee to become a party at all; but if he does so, he only continues the suit, not in substitution, but in conjunction with, and as the representative in interest of, the original plaintiff (Suput *v.* Imrit, I. L. R., 5 Calc., 720). But compare an unreported judgment of Westropp and Kemball, JJ., in Branson's Digest, p. 204, and Starling, 2nd Ed., p. 83). Plaintiff's assignee.

The principle of the proviso was, under the old law, applied to a case in which the person originally named as defendant was dead at the time of the institution of the suit, and his legal representatives were made parties after the expiry of the prescribed period (Sreekishen *v.* Ramkristo, 10 W. R., 317). But where the plaintiff, erroneously believing that A and B were the legal representatives of a deceased debtor, brought his suit in time against A and B, and after the expiry of the period of limitation made the true representative a party to the suit, it was held that the suit was barred (Kavasji *v.* Barjorji, 10 Bom., 224). The substituted party is evidently a *new* person. Sec. 22, cl. 3, proviso.

Section 22 does not provide for cases where by amendment of the plaint a *new cause of action* is added. If the *new cause of action* changes the character of the suit, or is inconsistent with the case as originally laid, no amendment will ordinarily be allowed. But if an additional case of misconduct (on the part of the defendant) causing further losses to the plaintiff is allowed to be inserted in the plaint, the date of the insertion of the additional cause of action is not to be taken into consideration; limitation must only count from the institution of the original suit. (New Fleming S. and W. Co. *v.* Kessowji, I. L. R., 9 Bom., 373, 401.)] Addition of new causes of action, after time, allowed.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. Sec. 23. Continuing breaches and wrongs.

[Cf. secs. 23 and 24, Act IX of 1871, and see arts. 19, 23, 42, 115 and 116, and 37, 38 and 39 of this Act.

See pp. 222-228, 245, *supra*, and the notes to sec. 24.

This section differs from secs. 23 and 24 of Act IX of 1871. Where the obligation created by a contract is of a recurring kind, and admits of a series of "successive breaches," this section does not apply, but sec. 23 of Act IX did apply to such cases (Bhojraj *v.* Gulshan, I. L. R., 4 All., 493). Art. 115 provides for some of these cases. Section 24 of Act IX referred to continuing nuisances only, and the term "nuisance" was defined to mean "anything done to the hurt or annoyance of another's immoveable property, and not amounting to a trespass." Section 23 of Act XV applies to any "continuing wrong independent of contract." A continuing trespass is a continuing wrong. See notes to art. 39. Compared with provisions of Act IX.

This section is not confined to suits for compensation only.

"A continuing breach of contract." The section contemplates cases in which the obligation created by the contract is *ex necessitate* of a continuing nature. As, for instance, a covenant by a tenant to keep the demised building in repair (Bhojraj *v.* Gulshan, I. L. R., 4 All., 493, 496). As to what is a continuing breach of contract, see pp. 222, 223, *supra*. Continuing breach of contract.

Persistent refusal to pay.

The persistent refusal to pay a debt, or to take delivery of goods purchased, is *not* a continuing breach. (See Mansab *v.* Gulab, I. L. R., 10 All., 85, 92).

Breach of covenants for title, &c.

If a person, having made a gift of his property to another, conveys the same to a third person, his covenant for title, so far as it relates to his present right to convey, is (according to Green, J.) broken at the date of the conveyance, and sec. 23 does not give the covenantee a continuing cause of action; but a covenant for "quiet possession" admits of a continuing breach. A covenant for "further assurance" is broken by a refusal of the covenantor to execute, or procure to be executed, a proper further assurance when tendered to him on the part of the covenantee (Raju *v.* Krishna, I. L. R., 2 Bom., 273, 292). Cf. Spoor *v.* Green, L. R., 9 Exch., 99.

Where an amicable partition of joint property was made between A and B, but C having a claim over the property allotted to B, it was agreed that A should pay a certain amount to C, A's failure to pay the amount to C, and thus to make B's title perfect, was held to be a continuing breach of contract (Imdad *v.* Nijabat, I. L. R., 6 All., 457).

The question as to the more or less continuous nature of covenants for title and for further assurance was considered by Kelly, C. B., in Spoor *v.* Green (L. R., 9 Exch., 99). According to the Chief Baron, a covenant for title and a covenant for further assurance are continuing covenants, and the breaches of them *continuing breaches*. The covenantee is not bound to sue until the ultimate damage has been sustained. The Statute of Limitation is wholly inapplicable to breaches of the covenant for title, except where the right of action is upon an eviction of the *whole* property conveyed, so that there is no land with which the covenant may run, and nothing left upon which the covenant can operate. (See Banning, 176, 183).

Breach of obligation arising from marriage.

The relation of husband and wife (so far as it is the result of a contract) furnishes another illustration of a continuing obligation, and it has been held in the Punjab that so long as a Mahomedan wife withholds herself from her husband, there is a "continuing breach of *contract*." (See the ruling of a Full Bench of the Punjab Chief Court, cited in Rivaz's Limitation Act, 3rd Ed., p. 134). The refusal of a Hindu wife to return to her husband and allow him the exercise of his conjugal rights, and the retention of the wife by a third person with whom she is living, constitute "continuing wrongs" giving rise to constantly recurring causes of action on demand and refusal. (Hem Chand *v.* Shiv, I. L. R., 16 Bom., p. 715, note; Baisari *v.* Hirachand, I. L. R., 16 Bom., 714). Marriage, according to Mahomedan law, is a civil contract. Among the Hindus marriage is a sacrament. So long as a Hindu wife withholds herself from her husband, there is a "continuing wrong." In the case of the retention of a Hindu or a Mahomedan wife by a *third* person (who is no party to any contract of marriage), the retention is a "continuing *wrong*." (See Binda *v.* Kaunsilia, I. L. R., 13 All., 126, at pp. 148 and 149).

Three kinds of torts or wrongs.

"A continuing wrong independent of contract." A "tort" is a wrong independent of contract. (Broom's Commentaries). The term "tort" is used to signify such wrongs as are in their nature distinguishable from breaches of contracts. Torts are often considered as of three kinds, *viz.*, nonfeasance, or the omission of some act which a man is bound to do; misfeasance, being the improper performance of some act which he may lawfully do; or malfeasance, being the commission of some act which is unlawful. (Stephen's Commentaries).

A completed tort is not a continuing wrong. Continuing wrong or injury should also be distinguished from continuing damage; the former does but the latter alone does not give rise to fresh causes of action. Completed tort and continuing damage.

In a "continuing wrong," the wrongful act complained of creates a *continuing source of injury*, and is of such a nature as to render the doer of it responsible for the continuance. The wrongful act produces a *state of affairs*, every moment's continuance of which is a new tort for which a fresh action is maintainable. (See Clerk and Lindsell on Torts, p. 96; Sidgwick on Damages, Vol. III, sec. 94, referred to in 3 Mad. L. J., p. 3). In cases of this class, damage is *not* (as it is, in cases under sec. 24) of the essence of the action. The act complained of is wrongful in itself. Continuing wrong. Damage not of the essence of action.

The flowing of water from defendant's premises into the plaintiff's land, when the defendant has not acquired any easement over such land, is a continuing wrong. (See Ramphull *v.* Misreelal, 24 W. R., 97). Obstructions to or diversions of watercourses are also continuing wrongs (Rajrup *v.* Abdul, I. L. R., 6 Calc., 394, P. C. See also Subramaniya *v.* Ramchandra, I. L. R., 1 Mad., 335; and Punja *v.* Bai Kuver, I. L. R., 6 Bom., 20). The disturbance of a right of ferry is in the nature of a nuisance, and the cause of action in the case of a violation of the right by a person who sets up another ferry in its vicinity is a continuing wrong within sec. 23 of Act XV of 1877. (Nityahari *v.* Dunne, I. L. R., 18 Calc., 652). Erecting a building opposite to an ancient window is a continuing wrong so long as the building is not pulled down. As long as a nuisance remains in force, the person affected by it has what is often called a continuing cause of action, and may recover damages on account of it, or sue for an injunction for its removal. In a suit for damages for trespass on immoveable property the trespass is treated as a continuing wrong until the occupation of the trespasser comes to an end (Narasinma *v.* Ragupathi, I. L. R., 6 Mad., 176, 178). A continued exclusion of a co-owner from joint possession of ijmali land is a *continued* wrong. (Ramchand *v.* Watson, I. L. R., 15 Calc., 215, at p. 221). But such exclusion does *not* amount to an ouster, if the co-owner in occupation of the land resists the entry of the other simply with the object of protecting himself in the profitable use of the land, in good husbandry, and *not* in *denial* of the other's *title*. (Watson *v.* Ramchand, I. L. R., 18 Calc., 10, P. C.) A decree for joint possession or an injunction is not the proper remedy in such a case. (*Ibid.*) Instances of continuing wrongs. (Ouster of co-owner).

False imprisonment is a continuing wrong, which is *specially* provided for by art. 19. As to whether throwing a heap of stones, building a wall, or planting posts or rails, on another's land and leaving them there, will amount to a continuing wrong or not, see Ramphal *v.* Raghunandan, I. L. R., 10 All., 498, at pp. 504, 505. See also pp. 225, 227, *supra*.

In the case of a continuing wrong, the plaintiff can sue for such *damages* only as accrued within the period prescribed by the law. Damages which accrued *earlier* might have been sued for in an earlier action, and damages which accrue afterwards may be sued for in a later action. (See Dwarka *v.* The Corporation, I. L. R., 18 Calc., 91, at p. 98, and pp. 244, 245, *supra*). On the subject of continuing wrongs, see 3 Mad. L. J., 2. Remedy in case of continuing wrong.

The failure to take out a license under Beng. Act II of 1888 is a "continuing offence" until the expiration of the period for which such license is required to be taken out.] Continuing offence.

Sec. 24. Suit for compensation for act not actionable without special damage.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustrations.

(*a*). A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

(*b*). A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.

[Cf. sec. 25, Act IX of 1871.

See pp. 225, 228 and 246, *supra*, and the notes to arts. 2 and 25.

Only *one* action allowed for *all* damages from one cause of action.

Generally speaking, all damage, whether present or prospective, arising from one cause of action, must be recovered once for all. Where, after an action for assault and battery and satisfaction of the decree, a fresh action for certain effects of the battery supervening was instituted, it was held that as there was no new assault and battery, a second action was not maintainable. The assault and battery being wrongful acts in themselves, all consequences of the wrongful acts must be supposed to have been considered by the Court in awarding damages in the first action. (Fetter *v.* Beale, 1 Salk., 11). This rule does not apply to cases where the act complained of is not wrongful in itself and where no cause of action arises until some specific damage is suffered (sec. 24), nor does the rule apply to the case of a continuing wrong which gives rise to what is inaccurately called a continuing cause of action (sec. 23). What is *called* a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. (Per Lindley, L. J., in Hole *v.* Chard, 1894, 1 Ch., 293, at p. 296). In these two classes of cases to which secs. 23 and 24 apply, successive actions may be necessary (see pp. 226, 227, *supra*, and Darby *v.* Mitchell, 11 App. Cas., 127, at pp. 148, 151).

Two apparent exceptions: sec. 23 and sec. 24.

Difference between the two secs.

In cases under sec. 24 a fresh cause of action arises when fresh damage results from the act complained of. In cases under sec. 23, fresh causes of action accrue every day that the wrong is allowed to continue.

Illus. (*a*) explained.

In Illustration (*a*), the original act itself is no wrong, and only becomes so by reason of the consequential damages. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained. (Sec. 34 of Act V of 1882). The mere withdrawal of a stratum of coal, by the owner of the subsoil, is in itself a perfectly legitimate and lawful act, and it is only because it is done without giving proper support to the superadjacent land or doing something else which would prevent the injury to the owner of the surface that the cause of action arises. The subsidence of the surface attributable either to the acts or default of the owner of the subsoil is itself an interference with the enjoyment of the surface, and, as such, constitutes the cause of action of the

owner of the surface. A second or further subsidence may give rise to a second cause of action. But as no suit would lie without damage, if the second subsidence does not cause to the plaintiff fresh damage in any true sense, such subsidence shall not give him a fresh right to sue. (Dwarka *v.* The Corporation, I. L. R., 18 Calc., 91). All damages which result from one and the same cause of action must be recovered at one and the same time. (*Ibid.*) According to Pigot, J., in the same case, the subsidence of the surface itself does not constitute the cause of action, the damage arising from the subsidence is the cause of action. (*Ibid.*, at p. 99). It has been held in England that a fresh cause of action arises when *fresh damage* to the plaintiff's property results by subsidence of the surface whether the subsidence (caused by the excavation) goes on continuously or occurs by fits and starts. When the cracks in the plaintiff's walls increased by reason of a continuous subsidence, a fresh cause of action accrued to him. (Crumbie *v.* Wallsend, 1891, 1 Q. B. (C. A.) 508). Fresh subsidence and fresh damage.

In Illustration (*b*) it is assumed that the original act itself does not give the plaintiff a legal cause of action. But it has been held that in British India a suit for compensation for slander does lie, without proof of special damage. (Parvathi *v.* Manner, I. L. R., 8 Mad., 175 ; Trailokya *v.* Chundra, I. L. R., 12 Calc., 424. See also Dewan Singh *v.* Mahip Singh, I. L. R., 10 All., 425, at pp. 448, 449). The *assumption* made in an Illustration of a section of the Limitation Act cannot abrogate any rule of *substantive* law. (See I. L. R., 13 All., 126, at p. 145, and I. L. R., 3 Bom., 207). Slander, without proof of special damage.

The violation of some duty towards the public, productive of special damage to the plaintiff, is governed by a rule similar to that which is assumed in Illus. (*b*). The breach of such a duty does not give any individual a cause of action until he has suffered some special damage. (See Banning, 271). The special damage to an individual in the case of a public nuisance must be (1) particular, (2) direct, and (3) substantial, in order that he may maintain a civil action in respect of it. Remote or consequential, fleeting, transient or unsubstantial damage is not sufficient. Per Lord Esher, in Benjamin *v.* Storr, L. R., 9 C. P., 400, cited in the *Indian Jurist* for June 1889. See pp. 360, 361, *supra*. In a civil action for the obstruction of a public way, the plaintiff must shew a particular damage suffered by himself over and above that suffered by all the Queen's subjects—some damage beyond and in excess of what other people have suffered—some damage peculiar to himself, his trade or calling. (Winterbottom *v.* Lord Derby, L. R., 2 Exch., 316 ; Satku *v.* Ibrahim, I. L. R., 2 Bom., 457 ; Ramphul *v.* Raghu, I. L. R., 10 All., 498, at p. 503 ; Siddeswara *v.* Krishna, I. L. R., 14 Mad., 177, at pp. 180, 181). It has been held that the rule of the English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any other member of the public, does not apply to a Zemindar who or whose predecessor in title had dedicated to the public the road over his zemindari land. (Tota *v.* Sardul, I. L. R., 10 All., 553). The principle of sec. 24 will also apply to negligent acts of the master causing damage to the servant, and to the unskilful conduct of professional men causing damage to those who employ them. In all these cases no cause of action arises until the damage is suffered. (See Collett on Torts, secs. 18 and 21). Breach of duty towards public. Special damage what. Dedicator of public way not bound to prove such damage. Other illustrations.

Cases of actionable damage to neighbours caused by the escape of water artificially collected on one's own land, or by any other act in

violation of the maxim *sic utere tuo ut alienum non-lædas* (see Madras R. Co. *v.* Zemindar, 22 W. R., 279, P. C.; and Ramlall *v.* Lill, I. L. R., 3 Calc., 776) also fall within the principle of this section.]

Sec. 25. Computation of time mentioned in instruments.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Illustrations.

(*a*). A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(*b*). A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

How to compute months and years.

[As to the computation of periods of time, see pp. 206, 207, 238, 239, 240, 242 and 252, *supra*.

Where a bond, by its terms, stated that the money advanced should be repaid on the 30th Pous 1283, B. S.; and it so happened that, in the year 1283, the month of Pous consisted only of 29 days, the 29th Pous corresponding to the 12th January 1877, it was held that the money became repayable on the 13th of January 1877, and that a suit brought on the 13th January 1880 was in time. (Almas Banee *v.* Mahomed Ruja, I. L. R., 6 Calc., 239). For a similar case in respect of the month of Masi of the year Tharana in Madras, see Gnanasammanda *v.* Palaniyandi, I. L. R., 17 Mad., 61. In such cases the money becomes repayable on the first day of the next native month, and the period of *limitation* is as usual computed *from* that date according to the Gregorian calendar. In a suit on a bond dated 29th November 1881, and payable in two years, the period of two years was held to have terminated on the 29th November 1883, that is, the day of the month corresponding with the day on which the bond was dated. (Venkubai *v.* Lakshman, I. L. R., 12 Bom., 617. See notes to sec. 12, cl. 1). The last 9 days of March, 30 days of April, and 31 days of May constitute 70 days or 10 weeks. The 22nd of March is the latest date which is *not less* than 10 weeks *before* the 1st June. (See Vinayak *v.* Madho, 1 C. P. L. R., 99).

Calendar month.

A calendar month is reckoned by looking at the calendar, and not by counting days.

In computing a calendar month or year it is sufficient to go from one day in one month or year to the numerically corresponding day in the next, and to *exclude* from the computation the day from which the month or the year is calculated. (See pp. 206, 207, 238, 240 and 598, *supra*). In computing the duration of a sentence of imprisonment or transportation, the day of the sentence is *included* as one day, and the term ends one day earlier than in other cases. (Migotti *v.* Colvill, L. R., 4 C. P., 233). In computing the age of majority also, the day of birth is *included* as one whole day. (See p. 254, *supra*). As there is no such date as the 30th of February, or the 31st of April, June, September or November, the computation must often end with the last day of these months. (See pp. 206, 207, *supra*).

Gregorian calendar.

In the year of the Council of Nice, 325 A.D., the vernal equinox fell on the 21st of March, and in the year 1582, or 1257 years after, it fell on the 11th of March. To correct this error, Pope Gregory XIII

caused 10 days to be omitted in that year, making the 15th of October follow the 4th ; and to prevent the recurrence of this error in future, he ordered that in every 400 years three of the Julian leap years should be regarded as ordinary years, *viz.*, those which complete centuries, the numbers expressing which centuries are not multiples of 4. Thus in the Gregorian or New Style, 1700, 1800 and 1900 are not leap years, but 1600 and 2000 are. In England the Gregorian or New Style was adopted on the 2nd of September 1752, when the error amounted to 11 days. (The Elements of Arithmetic by Dr. Gooroodas Banerjee, p. 140). Gregorian calendar.

Periods of limitation prescribed by any Act of the Government of India since 1868 are computed according to the British or Gregorian calendar. (Act I of 1868, and pp. 206, 238, *supra*). Periods of limitation prescribed by other Acts are, on general principles, reckoned according to the same calendar. (Saroda *v.* Pahali, I. L. R., 10 Calc., 913 ; p. 40, *supra*). Months and years in Acts.

Sec. 26 of Act IX of 1871, and sec. 25 of Act XV of 1877, overrule, for the purposes of those Acts, the decisions of the Bombay High Court (Ganpatrao *v.* Mannu, 5 Bom., 150 ; Lalji *v.* Ravji, 6 Bom., 136 ; Babaji *v.* Marute, 7 Bom., 77), that months and years in native instruments should be calculated according to the native calendar. For the purposes of the General Limitation Act, the parties to every instrument shall be deemed to have used the terms "year" and "month" in the sense which they bear in the Gregorian calendar. (Nilkanth *v.* Datta, I. L. R., 4 Bom., 103, p. 238, *supra*). For the purposes of special or local laws of limitation the terms "month" and "year" in native *instruments may* still mean "month" and "year" according to the native calendar. Months and years in *instruments.*

Sec. 25 lays down an absolute rule. There is no saving of cases in which it appears on the face of the instrument that lunar months and lunar years were intended by the parties. The period within which a debt is repayable must, for the purposes of this Act, be computed according to the Gregorian calendar, although by such computation the period would extend beyond the native month mentioned in the instrument as the month in which the debt is repayable. (Rungo *v.* Babaji, I. L. R., 6 Bom., 83.)] Intention of parties *not* considered.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

[Sections 26 and 27 treat of the *direct* acquisition of rights to easements, by possession, or strictly speaking, by *quasi*-possession. Section 28 deals with the *indirect* acquisition of the ownership of corporeal property by possession, or rather with the extinguishment of the right to such property by negative prescription.

Secs. 26 and 27 of Part IV are repealed in the territories to which the Indian Easements Act, 1882, extends. The Easements Act is now in force in the Madras and Bombay Presidencies, in the N. W. Provinces and Oude, in the Central Provinces, and in Coorg. (See sec. 1, Act V of 1882, and Act VIII of 1891). All references in any Act or Regulation to the said sections or to secs. 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections fifteen and sixteen of Act V of 1881. *Vide* sec. 3 of the Indian Easements Act, V of 1881, and p. 411, *supra*.]

Sec. 26. Acquisition of right to easements.

26. Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

Illus. (*a*). (*a*). A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1860 to 1st January 1880. The plaintiff is entitled to judgment.

Illus. (*b*). (*b*). In a like suit also brought in 1881, the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

Actual user, not mere *claim*.

[Notwithstanding this Illustration, it has been held that exercise of the right by continuous *actual* user is not necessary to the continuance of the enjoyment. Constructive enjoyment may be sufficient. (Koylas *v.* Sonatun, I. L. R., 7 Calc., 132). See also pp. 429-433, *supra*]. But a mere *claim*, however often repeated or long continued, and whether its validity has been questioned or not, will not (without actual and constructive *enjoyment*) suffice to establish a prescriptive right. "Actual user" in the Illustration means true *enjoyment* of the right as distinguished from a mere *claim* of the right. (See p. 429, *supra*).

Illus. (*c*). (*c*). In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

[In Illustration (*c*) the enjoyment was precarious, *i.e.*, not "as of right," at least, on one occasion, during the 20 years. (See pp. 421-423, *supra*).

Section 26 of this Act is exactly similar to sec. 27 of Act IX of 1871.

For a full commentary on secs. 26 and 27, see pp. 410 *et seq.*, *supra*.

Easements, rights *in gross*, and licenses.

"Easements" in Act XV of 1877 include profits *à prendre* (such as rights of fishing) whether appurtenant to some immoveable property of the claimant, or not. (Chundee *v.* Shib, I. L. R., 5 Calc., 945). See also pp. 345, 346 and 390, *supra*). It has not yet been decided whether servitudes *in gross*, not amounting to profits, are easements within the meaning of this Act. (See p. 390, *supra*). In the Central Provinces where the Easements Act of 1882 is in force, it has been held that an easement of a way for driving cattle must be *appurtenant* to the plaintiff's property. (Hira *v.* Khusalgir, 2 Cent. Pro. L. Rep., 34). A mere *license* to walk over another's land, or to use it as a privy, is not an easement. (Prosonno *v.* Ram Coomar, I. L. R., 16 Calc., 640). But where an instrument of transfer creates a corporeal right to some immoveable property, and the very same instrument gives the transferee a privilege to use some *other* land as ancillary to the enjoyment of the property transferred, the privilege is *not* a license which may be revoked at the pleasure of the grantor. (Vishnu *v.* Rango, I. L. R., 18 Bom., 382, at p. 386). On the subject of licenses, see pp. 354-356, *supra*.

Customs.

Customary rights *in gross* are not easements properly so called. Rights of the inhabitants of certain villages to bathe in another's tank, to enter his land and hold horse-races there, to place *tazias* on another's land during the Mohurrum, &c., &c., are instances of such rights. (See 1 Mad. Law Journal, p. 47; Mamman *v.* Kuar, I. L. R., 16 All., 178; pp. 357, 358, 400-402, *supra*).

Public rights.

Public rights of way are not easements. The existence of such rights may be presumed from eight or even six years' user. (Anderson *v.* Juggadamba, 6 C. L. R., 282; pp. 360, 361, *supra*).

Ferries.

An exclusive right to set up a private ferry bears a close analogy to easements, and such a right may be acquired by twenty years' user or enjoyment. (Purmeshuri *v.* Mahomed, I. L. R., 6 Calc., 608). But cf. Nityabasi *v.* Dunne, I. L. R., 18 Calc., 652, and see pp. 364, 365, *supra*.

Monopolies, easements of necessity.

It has been held by O'Kinealy and Ameer Ali, JJ., that secs. 26-28 do not apply to the acquisition of a *monopoly* of a right of ferry, or any other *monopoly*. (I. L. R., 18 Calc., 652). An easement of necessity is acquired by an implied grant. (See p. 393, *supra*).

Natural rights.

"Natural rights" do not require any age to ripen them. (See pp. 351, 352, *supra*).

Affirmative and negative easements.

Rights, to receive light or air through windows, to the uninterrupted flow of streams in permanent artificial channels, to support of buildings from subjacent or adjacent soil, and the customary easement of privacy are instances of negative easements. A right of way and other easements generally are affirmative. Strictly speaking, there are no purely affirmative or negative easements. (See p. 373, *supra*).

Against Government.

In Arzan *v.* Rakhal, I. L. R., 10 Calc., 214, 219, it was assumed that sec. 26 applied to the acquisition of easements against the Government. But it has been recently pointed out that the section does not apply to such a case. (Secretary of State *v.* Mathurabhai, I. L. R., 14 Bom., 213; p. 439, *supra*).

Other modes of acquisition.

Act XV, sec. 26, does not exclude or interfere with other titles and modes of acquiring easements. (See p. 411, *supra*, and Rajrup Koer *v.* Abul Hossein, I. L. R., 6 Calc., 394, P. C.) Where the enjoy-

Presumption of a legal origin.

ment of an easement lasted *more* than 20 years, such enjoyment may be referred to a *legal origin*, although such enjoyment having been interrupted for more than two years before the institution of the suit was not sufficient to establish a title under sec. 26. (See I. L. R., 6 Calc., 394, P. C ; Amritanath *v.* Motilal, 4 Cent. Prov. L. Rep., 16). Where there has been an "interruption" in the enjoyment within the prescriptive period or where the enjoyment cannot be brought down to within two years of the commencement of the suit, the right cannot be acquired under the *Act*. But in such cases other modes of acquisition are still available. The presumption of a legal origin or a non-existing grant may arise even where the Act is inapplicable. (See Goddard, 4th Ed., p. 151, note).

Customary easement.

A right to prevent interference with *privacy* may be acquired in virtue of a *custom*. Even a Christian may enforce such a *customary easement* in the North-Western Provinces. (Abdul *v.* Emile, I. L. R., 16 All., 69 ; pp. 358, 383, *supra*).

As to easement of necessity, and implied grants of easements, see pp. 393-400, *supra*.

Flux body.

It has been held that an unincorporated and fluctuating body of persons, as the inhabitants of certain villages, cannot claim an easement, specially a profit *à prendre*, by prescription. (See pp. 457 and 416, *supra*, and Luchmeeput *v.* Sadaullah, I. L. R., 9 Calc., 698).

Nature of enjoyment required.

Sec. 26 says that the right to light or air, as well as the right to other easements, must be enjoyed "as of right," but it does not expressly say that the right to light or air must be "openly enjoyed by any person claiming title thereto." (See pp. 418, 428, *supra*).

As of right.

"Enjoyed as of right," *i.e.*, enjoyed by a person in the assertion of a right, and not under leave or license. The phrase does not imply a right obtained by grant from the servient owner. The enjoyment must not involve the admission of an obstructive right in the servient owner. (Alimoodeen *v.* Wuzeer Ali, 23 W. R., 52 ; Mathuradas *v.* Bai Amthi, I. L. R., 7 Bom., 522 ; pp. 421-423, *supra*).

Claiming title.

"Claiming title thereto," *i.e.*, claiming a right to the easement against all persons, and especially as against the owner of the servient heritage. (Modhoosoodun *v.* Bissonath, 15 B. L. R., 361, 365 and 366). An easement can hardly be enjoyed "as of right," unless the person enjoying it claims a title thereto. But the first paragraph of sec. 20 would seem to show that this is possible, in the case of light and air.

Peaceable.

"Peaceable."—Not contentious ; without opposition by others, and without force or violence by the claimant. (See p. 417, *supra*).

Open.

"Open."—Not clandestine or by stealth. If the enjoyment is open and manifest, it is not necessary that the servient owner should have actual knowledge of such enjoyment. (See p. 418, *supra* ; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214).

As an easement.

"Enjoyment as an easement."—Not as owner or occupier of the servient heritage, but as claiming a servitude in or over land which does not belong to the claimant. (See pp. 348, 419, *supra*).

Tenant's easement in *other* land of the same owner.

As the lessor of a piece of land is in possession of it through his tenant, the possession of the latter is not adverse to the former. A tenant cannot, therefore, acquire by *prescription* an easement over another piece of land in the *khas* possession of his lessor. (Udit *v.* Kashi, I. L. R., 14 All., 485). But though an easement cannot be *adversely* acquired by a tenant against his landlord, it may be acquired by a *grant* from the landlord. (See Dalil *v.* Bhajju, I. L. R., 16 All., 181 ; pp. 368, 369, 427, 428, *supra*).

It has been held that in order to acquire an easement under sec. 26 of the Limitation Act, the enjoyment must have been by a person *claiming* title thereto *as an easement* as of right for twenty years. Where it appears from the case the plaintiff made in a previous unsuccessful suit that he never claimed the right as an *easement*, but by right of *ownership* of the land itself, his present claim to an *easement* under sec. 26 must fail. Evidence of (even) immemorial user, adduced in support of a right founded on *ownership*, does not, when that right is negatived, tend to establish an easement. (Chunilal *v.* Mangaldas, I. L. R., 16 Bom., 592). As to inconsistent alternative claims, see pp. 367, 368, *supra*. Easement and ownership inconsistent.

"Without interruption."—Without an actual cessation of enjoyment caused by an obstruction by the act of some person other than the claimant himself. If such obstruction has not been acquiesced in for one year after the claimant had notice thereof, and of the person making or authorizing the same to be made, it will not amount to an "interruption" within the meaning of this section. (See pp. 432, 433, *supra*). An intermission is not an "interruption." A cessation of actual user occasioned by an accident, or by a voluntary omission on the part of the claimant himself, does not amount to an "interruption. (*Ibid.*) Where the cessation of user in fact may be explained consistently with continued (constructive) enjoyment of the right, such period of constructive enjoyment is not excluded in the computation of the period of 20 years. (See p. 436, *supra*). The word "discontinuance" in the explanation means "cessation," and not discontinuance in the strict sense of the term. (Shamachurn *v.* Tariny, 1. L. R., 1 Calc., 422 ; pp. 432, 433, *supra*). If the cessation of user arises out of a voluntary *discontinuance* (which operates as an *abandonment* of the inchoate right), the claimant cannot, of course, establish his right. Such cessation of user, nevertheless, is not an interruption in the technical sense. Repeated adverse obstructions, although not amounting to "interruptions," may show that the enjoyment is not peaceable. (See p. 434, *supra*). Mere protests or verbal denials of the right claimed, not followed by any act to prevent the user, will not constitute an interruption of the right, or prevent its acquisition by prescription. (Angus *v.* Dalton, 6 App. Cas., 740 ; Washburn on Easements, 4th Ed., pp. 183, 184). Interruptions *in fact*, when they amount to interruptions in the technical sense, destroy the effect of the previous user. In Onley *v.* Gardiner, 4 Mus. and W., 496, 500, it was said that intervals of valid enjoyment, separated by interruptions in the enjoyment, *as of right*, or *as an easement*, could not be added together to make up the 20 years' enjoyment required by sec. 2 of the English Act. But such intervals are allowed to be tacked together in the case of *light* under sec. 3 of that Act. (L. R., 6 Ch. Ap., 763). And in the opinion of the Court of Appeal, periods of enjoyment separated by unity of possession may be so added to make up the 20 years in the case of other easements also. (See pp. 406, 420, 421, 434-35 ; and Hollins *v.* Verney, 13 Q. B. D., 304, at pp. 312, 313). In such a case (as in cases falling under sec. 27), two periods of valid enjoyment, separated by a period of invalid enjoyment, may, perhaps, be tacked together to make up the required period of twenty years. (See p. 437, *supra*). Without interruption. Intermission. Cessation. Discontinuance. Mere protests. Effect of interruptions. Tacking of separated periods of enjoyment.

Enjoyment may continue, although there has been no actual user or exercise of the right for some time. (Koylas *v.* Sonatun, I. L. R., 7 Calc., 132, and pp. 430-32, *supra*). An easement may be actually enjoyed even when it is not being exercised. (Markby's Elements of Law, 3rd Edition, p. 279). But actual enjoyment on two or three occasions at very long intervals cannot be treated as continuous Constructive enjoyment.

enjoyment within the meaning of sec. 26. (See Hollins *v.* Verney, 13 Q. B. D., 304; pp. 431, 432, *supra*).

Clause 4.

Cl. 4, not a cl. of limitation.

A period of 20 years "ending within two years next before the institution of the suit." This is not a provision relating to limitation properly so called. (Rajrup Koer *v.* Abdul Hossein, I. L. R., 6 Calc., 394, 403, P. C.) The claimant cannot establish his title by proving user for a period of twenty years at *any distance* of time. The 4th clause of sec. 26 defines the period of enjoyment required, and does not lay down a rule of limitation strictly so called. The claimant must, nevertheless, bring his suit within two years from the end of the required period of enjoyment. If he does not, he cannot establish his right under this *statutory* rule of prescription. (Luchmee Pershad *v.* Tiluckdharee, 24 W. R., 295). But the claimant may establish his right by immemorial prescription or by some other mode. (Rajrup *v.* Abul Hossein, I. L. R., 6 Calc., 394, P. C.; and pp. 411, 415, *supra*).

Rules of limitation strictly so called.

Articles 37 and 38, sched. II, Act XV of 1877, lay down rules of limitation (properly so called) for suits for compensation for obstructing a way or a watercourse or for diverting a watercourse. Arts. 31 and 32 of sched. II, Act IX of 1871, corresponded to these articles. Art. 146 of Act IX of 1871 enacted that a suit for a declaration of a right to an easement must be brought within 12 years from the time when the easement ceased to be enjoyed. This too was a rule of limitation properly so called. But Act IX of 1871 has been repealed, and art. 146 of that Act has not been reproduced in Act XV of 1877.

The distinction between limitation under art. 144, and prescription under sec. 26, depends upon the claim as laid. If the plaintiff sues to recover *possession* of a tree, and the defendant pleads *adverse possession* of the tree, and not merely an easement over it, he will succeed if he proves not 20 but only 12 years' adverse possession. (Bapu *v.* Dhondi, I. L. R., 16 Bom., 353, 356).

Limitation as to rights claimed *independently* of sec. 26.

It has been held, in some cases, that a suit to recover a right to an easement (claimed otherwise than under the statutory rule of prescription) may be instituted within twelve years, like other suits for an interest in immoveable property. (Kurupum *v.* Meranji, I. L. R., 5 Mad., 253; Mohunt Deo *v.* Mohamed, 24 W. R., 300). But there is a dictum of their Lordship of the Privy Council to the effect that where a watercourse has been obstructed for more than two, but less than twenty, years, a suit to establish a right to the watercourse (otherwise than under the rule of statutory prescription) and to obtain the removal of the obstruction, is not barred by any provisions of the Limitation Act of 1871. (Rajrup Koer *v.* Abdul Hossein, I. L. R., 6 Calc., 394, at p. 402). It may be noted that the repeal of article 146 of the Act of 1871, which might possibly apply to such a suit, makes this dictum more applicable to similar suits under Act XV of 1877. Where a plaintiff, who had already obtained a decree establishing his right to an easement under the statutory rule, sued the servient owner for the removal of a subsequent obstruction, it was held by Mr. Justice Norris in an unreported case (Second Appeal No. 162 of 1892, decided on the 17th August 1892) that the obstruction was a continuing wrong, and that the plaintiff's suit (though instituted more than six years after the date of the obstruction) was saved from the bar of limitation, by sec. 23 of the Act. (See also Punja *v.* Bai Kuvar, I. L. R., 6 Bom., 20). Under Act V of 1882, an easement is not extinguished until it has ceased to be enjoyed for twenty years, and there can be no doubt

that the dictum of the Privy Council applies to cases arising in Provinces to which Act V of 1882 has been extended.

Right, absolute and indefeasible.

A right acquired by prescription under the Act is absolute and indefeasible against all the world. No right at all is acquired against any body until it binds *all* persons having interest in the *locus in quo*. (See Wheaton *v.* Maple, 1893, 3 Ch., 48, at pp. 65, 68, 72). Rights acquired under the Act are absolute and indefeasible, not subject to any condition or qualification. (See pp. 446, 447, *supra*). No attempt to extend the user by the dominant owner can have the effect of defeating or extinguishing such indefeasible rights. (See note 9, pp. 461, 462, *supra*).

Effect of revenue sales.

Is an easement acquired by prescription under sec. 26 over a revenue-paying estate in Bengal, "an encumbrance imposed upon it" within the meaning of secs. 37 and 52 of Act XI of 1859? In Goluck *v.* Huro, 8 W. R., 62, it has been held that an encroachment on the estate by a neighbouring proprietor is such an encumbrance, and that the auction-purchaser at a revenue sale is entitled to get the estate free from such an encumbrance. If it be held by analogy that a prescriptive right of easement acquired by a neighbour is also an "encumbrance imposed upon the estate," the auction-purchaser at a revenue sale would be entitled to annul it, unless he was debarred by the legislative declaration that the right when acquired is "absolute and indefeasible." (See pp. 446, 461, 464, notes, *supra*).

Decree retrospective.

A decree establishing a right under sec. 26 has retrospective effect. It legalizes all the trespasses committed during the twenty years. (See p. 447, *supra*).

Access of light.

"Access and use of light."—The access referred to is the access or freedom of passage over the servient heritage, as defined by the window or other aperture in the dominant heritage. The window or other aperture in the dominant building serves to measure and define the area which must be kept free in the servient heritage. (Per Fry, L. J., in Scott *v.* Pape, 31 Ch. D., 554). The Act is silent as to identity of aperture or building. Enlarging or diminishing the aperture, or the setting back or forward of the wall containing the aperture, does not necessarily extinguish the right. (*Ibid.*; see also p. 460, *supra*). The use of a small window for ten out of twenty years, and the use of the same window after its enlargement for the remaining ten years, will give a right to the minimum portion of the rays of light which passed through the smaller structure. (Per Bowen, L. J., at p. 572, 31 Ch. D.)

Wind or breeze.

Air.

In Bagram *v.* Khetternath (3 B. L. R., O. C., 18, 46), Peacock, C. J., was of opinion that a right to enjoy the south breeze could not be acquired except by an express grant; and that in the case of a right to air, the obstruction to be actionable must amount to a nuisance. In Barrow *v.* Archer, 2 Hyde, 125, it was held that a right to the free and uninterrupted passage of a current of wind could not be claimed by reason of mere long enjoyment, and that no more air could be so claimed than what was sufficient for sanitary purposes. (See also Modhoosoodun *v.* Bissonath, 15 B. L. R., 361). In Act V of 1882, the Legislature does not follow these rulings, as to the extent of the right to air, on the ground that they are unsuited to a country like India. The Act allows a suit for the obstruction of the free passage of air, where it interferes materially with the plaintiff's physical comfort, although it is not injurious to his health. (See Statement of Objects and Reasons, *Gazette of India*, 30th November 1880). In Bengal (and in all other provinces to which Act V of 1881 has not been extended) the old law is still enforced. (See Delhi and London Bank *v.* Hem

Lall, I. L. R., 14 Calc., 839, at pp. 854, 855). Trevelyan, J., in this case held that, in the case of light, the claimant is entitled to what is reasonably necessary for the comfortable habitation of his premises; and that, in the case of air, the claimant is entitled to as much air as may be necessary to prevent those premises being rendered unfit for habitation or business. (See pp. 452 *et seq.*, *supra*).

45° rule. As to the so-called rule relating to obstructions which prevent light falling at an angle of 45 degrees, see pp. 453 *et seq.*, *supra*.

Light and air. It should be observed that sec. 3 of 2 and 3 Will. IV, c. 71, speaks only of the "access and use of light," and that sec. 26 of Act XV of 1877 places the right to light and the right to air (as regards their acquisition by prescription) in the same category. Sec. 27 of Act IX of 1871 also applied the same rule to both the rights.

Buildings, and windows. Timber stages with large apertures do not come under the words "any dwelling-house, workshop, or other buildings" in the English Prescription Act. (Per Chitty, J., in Harris *v.* De Pinna, 33 Ch. D., 238). The wide signification of the words "any building," which only are to be found in sec. 26, is not restricted in any way.

The windows of a new building must be in a sufficiently finished state at the date from which the twenty years are to be computed. (See Elliott *v.* Bhoobun, 6 B. L. R., 85; and 12 B. L. R., 406, P. C.) It is not necessary that the house should have been completed or used. (Pranjevandoss *v.* Mayaram, 1 Bom., 148). As the acquiescence of the servient owner is not necessary to the acquisition of a right under the Act, the ruling in Elliott's case that there may be interruption (by protest or notice) without an actual obstruction does not apply to such acquisition. (See p. 434, *supra*).

Same opening and same access. The access of light to which plaintiff acquires a right must be the same access as that which he has enjoyed. You cannot claim a window in one part of the building, because you have been accustomed to enjoy a window in another part of the building. (Per Bowen, L. J., in Harris *v.* De Pinna, 33 Ch. D., 238, at p. 261).

"Ancient lights," "right to light," and right to flow of water. Windows in respect of which a prescriptive right to light has been acquired are often spoken as "ancient lights." The expression "right to light" ought, in strictness, to be used to designate the *natural* right of every owner of a building to open windows in it for the admission of light and air. But the expression is generally used to mean an *acquired* easement, that a neighbour shall not build on his own land, so as to hinder the light from entering our windows. The natural right to the flow of light and air is subordinate to our neighbour's right to build on his own land. But the natural right to the flow of the water of a natural stream is paramount, and even the owner of the bed of the stream cannot prevent it flowing in its ordinary course, until he has acquired the right to do so as an easement. Thus, water may not be obstructed unless the obstructor has acquired an easement; while light and air may be obstructed unless the person obstructed has acquired an easement in respect of them. (Goddard, 4th Ed., pp. 48-49).

Ways. Way.—A right of way is a right to go from one place to another, and ought to be circumscribed to a place certain, and not in one place to-day and another to-morrow, and, therefore, the *termini a quo* and *ad quem* should appear. (Gale, 357, note; Goluck *v.* Tarini, 4 W. R., 49; pp. 444, 448, 449, *supra*).

Kinds of ways. In English or Indian law there is no positive division of rights of way into distinct classes, and it cannot be said that a superior class of rights necessarily includes an inferior class. (See Gale, 352, 355,

note). The following are some of the various kinds of rights of way to be met with in the books :—A general right of way, *i.e.*, a way usable for all purposes, *e.g.*, a way for marriage and funeral processions, as well as for other purposes. (See Lokenath *v.* Monmohun, 20 W. R., 293). A way for agricultural purposes only. A right of way for carriages, but not for carts. A right of way for horses, and not for carriages. A right of way for th e carriage of coals only. A right of way for the carriage of all other articles except coals. A foot-way or prime way. A drift way or packway for cattle. A way for boats. A way to church. A way to market. A right to use the way only when certain gates are open or between particular hours, or at certain seasons of the year. (See Oomer Shah *v.* Rumzan, 10 W. R., 363 ; Koylas *v.* Sonatun, I. L. R., 7 Calc., 132. See also pp. 377, 431, 432, *supra*). Kinds of ways.

A's easement to draw water from B's well gives A a right of way over B's land, to and from the well. Such a right is called an accessory or secondary easement. But a prescriptive right to have the branches of A's trees overhanging B's land does *not* give A any (accessory) right to go on B's land to pick the fruit off the branches. (Naik *v.* Gandrap, I. L. R., 17 Bom., 745 ; p. 459, *supra*). Accessory rights.

The extent and mode of enjoyment of a *prescriptive* easement is *generally* determined by the accustomed user of the right. Two *special* rules are laid down by Act V of 1882 in respect of the easements of light and air, and of the right to pollute air or water. (See pp. 350-456, *supra*). Extent of prescriptive rights.

The extent of a right of way acquired by prescription is measured by the accustomed user. As to whether the evidence of the actual user in any particular case may prove a general right for *all* purposes, see pp. 448, 449, *supra*. The question whether user of one kind is evidence of a right also for a more limited purpose, must be determined with reference to the particular facts of each case ; and if the actual amount of inconvenience suffered by the servient owner is not in any way increased by the exercise of such inferior right, the presumption is that such a right has been acquired. (See Gale, 352, 353 ; Goddard, 247, 248). A right of way *per se* does not give a right to carry burdens on the head, for such a right would impose a more onerous obligation on the servient owner, who, if he wanted to build, must leave a higher space than he would otherwise be obliged to do. (See Gale, 356, note. See also pp. 444, 448, 449, *supra*). Extent of rights of ways. Carrying burdens on the head.

Where a right of way for a particular purpose (*e.g.*, for carrying away the plaintiff's nightsoil) is proved, the Court is not bound to confine the right to the precise number of times in the year that it has been exercised ; but may give the evidence of user a more liberal construction, and hold that the right may be exercised for such purpose at all convenient times in the year, or as often as is necessary. (Gopal Chunder *v.* Jodoolall, I. L. R., 9 Calc., 778 ; I. L. R., 13 Calc., 136, P. C. ; pp. 448, 449, *supra*). Carrying nightsoil.

A right of way may be enjoyed "as of right," and established under this section, notwithstanding the fact that the path passes over waste or unoccupied land. (Shaikh Mahomed *v.* Shaik Sefatoollah, 22 W. R., 340 ; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214). But it has been held in the Central Provinces that the passing of cattle over a piece of waste jungle land belonging to the defendant is presumably *not* enjoyment *as of right*, for it is very likely that no one would object if cattle passed over such land. (Hira *v.* Khusalgir, 2 Cent. Prov. L. Rep., 34). See also some remarks of Loch, J., in Imambandee *v.* Sheo Dyal, 14 W. R., 199. Until a claim is openly asserted and adversely exercised, any owner of land may well be content to allow others to use Ways over waste land.

Concession or permission.

his property in a way which gives enjoyment to them without harming him, or even at some personal sacrifice to himself. Such *concessions* should not be used against the owner as evidence of an enjoyment "as of right." (See Smith *v.* Andrews, 1891, 2 Ch., 648, at p. 702). A right to do certain things over Government waste by *permission* of Government is *not* an easement. (Nagappa *v.* Subba, I. L. R., 16 Mad., 304).

Verandahs over a pathway.

It is a mistake to suppose that the same rights *usque ad cœlum* attach to an *easement* on land, which attach to the *land* itself. The erection of a portico or verandah, even when it encroaches on part of the space devoted to the way, is not actionable unless it interferes with the reasonable enjoyment of the easement. (Toolseymoney *v.* Jogesh, 1 C. L. R., 425; Clifford *v.* Hoare, L. R., 9 C. P., 362; pp. 383, 458, *supra*).

Watercourse.

Watercourse.—This word designates either the bed or channel, the moving water as it flows in the channel, or an easement in connection with the water. In the English Prescription Act the word is used with reference to easements claimed in connection with the moving water of streams. (Goddard, 4th Ed., p. 194). Water which does not run in a definite channel, *i.e.*, between banks more or less defined, or water which squanders itself over an indefinite surface, is not, strictly speaking, a watercourse, nor a proper subject-matter for the acquisition of a right by user. (Rawstron *v.* Taylor, 11 Exch., 369). It has been held in England that a claim of right to pollute or adulterate the water of a natural stream is a claim of a watercourse. (Gale, 169). A right to pour water over the land of another person or a right to divert water from flowing down to particular land is also a right to a watercourse. (Goddard, 123). The right to discharge rainwater by eaves (*stillicidium*) or by drain or gutter (*flumen*) is a right to a watercourse. (Gale, 273). Water in a tank is not a watercourse; but there may be an easement to use such water.

Use of water.

The "use of water" probably means rights to take water for consumption or similar use, and not rights to use the water of streams as it flows, for instance, to turn a mill, for that would be right to a "watercourse." (Goddard, 4th Ed., p. 195). A right to the use of water for domestic purposes does not include a right to take water for building purposes. (Esubai *v.* Damodar, I. L. R., 16 Bom., 550, at p. 560). There may also be a prescriptive easement to throw stones or other refuse into a tank, provided the right does not tend to the total destruction of the servient heritage. In Carlyon *v.* Lovering, cited in Gale's work, p. 485 (note), such a right in the case of a stream was recognized. The placitum in Sreedhur *v.* Adoyto, 20 W. R., 237, that there can be no prescriptive right to injure another (by throwing burnt earth into his tank) though such injury has the warrant of very ancient user, can hardly be correct. (See Gale, 484, note, and p. 447, *supra*).

For an enumeration of other important easements, see pp. 380-383, *supra*.]

Sec. 27. Exclusion in favour of reversioner of servient tenement.

27. Provided that, when any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of easement during the continuance of such interest or term shall be excluded in

Conditional exclusion.

the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the

determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that, during ten of these years, C, a Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

[Sec. 28, Act IX of 1871, which corresponded to this section, did *not* apply to easements of light or air. Sec. 27 of Act XV applies to *all* easements. For a commentary on sec. 27, see pp. 437, 438, *supra*. The lessor, remainderman, or reversioner may resist or contest the claim to an easement. Such resistance and contest need not amount to an *interruption* of the enjoyment of the easement within the meaning of the Explanation, in sec. 26. See p. 434, *supra*.

Sec. 27 applies to *all* easements.

No right at all is acquired, even against the lessee of the servient heritage until the three years allowed to his lessor by sec. 27 have already expired. (Wheaton *v.* Maple, 1893, 3 Ch., 48, at pp. 65, 66, 72).

No right at all, if not absolute.

At *common* law, if user begins (adversely to the owner) *before* the tenancy, a presumption of a grant may be made, against the owner, after 20 years' enjoyment, although the tenancy does not cease before the end of the 20 years. (Cross *v.* Lewis, 2 B. and C., 686). Under sec. 27, the term of the lease must be excluded in the computation of the 20 years, even if the user begins before the tenancy.

User commenced *before* tenancy.

A mortgagee in possession for a term of years holds the mortgaged land "by virtue of an interest for a term of years," and the time during which he is in possession must, it seems, be excluded, provided the owner contests the claim within three years, that is, provided he complies with the condition upon which only he can take advantage of the provisions of this section.

Case of mortgagee in possession.

The corresponding section of Act IX of 1871 expressly excepted the right to light and air from its operation. This section omits the exception. It applies to all easements which have been enjoyed or derived upon, over or from any land or water. The effect of this proviso (sec. 27) is to extend the required period of continuous enjoyment, by so long a time as the term or life-interest continues. The "period (of 20 years) ending within two years next before the institution of the suit" required by sec. 26 is, in cases falling under sec. 27, only *constructively* "next before" such institution. See p. 437, *supra*.]

Effect of the proviso (sec. 27).

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Sec. 28. Extinguishment of right to property.

[For a full commentary on sec. 28, see pp. 324 *et seq.*, *supra*. "Property."—Moveables as well as immoveables. (See pp. 325, 326, *supra*). "Suit for possession."—Not a suit for damages, compensation, specific performance or injunction. A suit for possession under art. 3 of the schedule is not a suit for possession within the meaning of this section. (See pp. 321, 330, *supra*, and Stokes' Anglo-Indian Codes, Vol. II, p. 950). The right of the person whose suit for possession is barred by limitation under this Act is directly extinguished, and indirectly transferred to the party in possession of the property. (See pp. 332, 333, *supra*). Cf. sec. 29, Act IX of 1871.]

Indirect transfer of right.

THE FIRST SCHEDULE.

(*See section 2*).

Number and year of Acts.	*Title.*	*Extent of repeal.*
X of 1865 ...	*The Indian Succession Act.*	*In section 321, the words "within two years after the death of the testator, or one year after the legacy has been paid."*
IX of 1871 ...	*The Indian Limitation Act, 1871.*	*The whole.*
X of 1877 ...	*The Code of Civil Procedure.*	*Section 599, and in section 601 the words "within thirty days from the date of the order."* [*N.B.—Sec. 599 was re-enacted by Act XIV of 1882, but it has been again repealed by Act VII of 1888.*]

[The first schedule has been repealed by Act XII of 1891. The repeal of a repealing law does not revive the Acts originally repealed.]

THE SECOND SCHEDULE.

(*See section* 4.)

FIRST DIVISION : SUITS.

Part I.—Thirty days.

Description of suit.	Period of limitation.	Time from which period begins to run.
1.—To contest an award of the Board of Revenue under Act No. XXIII of 1863 (*to provide for the adjudication of claims to waste lands*).	Thirty days ...	When notice of the award is delivered to the plaintiff.

[No. 1. (No. 1, Sched. II, Act IX of 1871). The suit under this article is instituted (in a Court specially constituted under Act XXIII of 1863) by the claimant, or objector, on receipt of notice of the Board's adverse award. The Collector notifies such award to the special Court, and the Court gives notice to the claimant or objector. This article does not apply to suits *by* Government to try claims to waste lands where such claims have been admitted by the Revenue Authorities. See secs. 5 and 7 of Act XXIII of 1863, and Taranath Dutt *v.* The Collector of Sylhet and others, 5 W. R., Waste Land Court's Reference, p. 1, where it was held that the Court could not extend the period of limitation by any order of its own. The exceptions recognized by Act XV may, of course, extend that period.]

Part II.—Ninety days.

2.—For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India.	Ninety days ...	When the act or omission takes place.

[No. 2. (No. 2, Act IX). Local or special Acts may lay down a longer or shorter period of limitation for such suits for compensation. This article, like the corresponding provisions of local or special laws, applies to suits for compensation, not to suits for recovery of land or declaration of title. (See Foot *v.* Mayor of Margate, 11 Q. B. D., 299; Chunder *v.* Obhoy, I. L. R., 6 Calc., 8, F. B.; Birj *v.* The Collector, I. L. R., 4 All., 102. See also 5 B. L. R., App., 50; 12 Bom., 250; I. L. R., 1 All., 269; Joharmal *v.* Municipality, I. L. R., 6 Bom., 580; Syed Ameer *v.* Venkatarama, I. L. R., 16 Mad., 296; President *v.* Narayan, I. L. R., 16 Mad., 317; Srinivasa *v.* Rathna, I. L. R., 16 Mad., 474). It does not also apply to suits for breaches of contract, *e.g.*, to recover the price of goods supplied to a public servant. (See Mayandi *v.* McQuahar, I. L. R., 2 Mad., 124). A suit for a refund of money illegally levied may be treated as a suit for compensation. See Ranchhod *v.* The Municipality, I. L. R., 8 Bom., 421; see also I. L. R., 2 Mad., 124, 125.

Suits for land.

For breach of contract.

For refund of taxes.

An omission to repair the hand rail of a bridge may be a "something *done*" under an enactment. (Dwarka *v.* The Corporation, I. L. R., 18 Calc., 91, at p. 97). Article 2 *expressly* refers to acts *done* as well as to acts *omitted*. A criminal prosecution by the Chairman of a Municipality is not an act done under the Municipal Act. (See Annaji *v.* Subramanya, I. L. R., 13 Mad., 442).

Omissions.

Criminal prosecution.

Compensation for an act under color of, but contrary to, the law, must be sued for within the period allowed. (See Gooroodas *v.* The Collector, 5 W. R., 137; see also I. L. R., 8 Bom., 421). It has been held by the Punjab Chief Court that the words "alleged to be," which did not occur in the corresponding article of Act IX of 1871, must be reasonably construed, and that the defendant is entitled to take advantage of the shorter period of limitation prescribed by this article, if he honestly believed in the existence of a state of facts which, if it had existed, would have justified him, under the enactment, to do the thing complained of. (Rivaz, 3rd Ed., 96).

Acts believed to be *under* a law actually in force.

The enactment (Act, Regulation or Statute) must have been actually in force at the time and place when and where the act complained of was done. A mere honest belief that it was in force is not sufficient. (Rivaz., 3rd Ed., p. 97).

If the act complained of (such as excavating a road) does not give rise to a cause of action until some special damage results therefrom (such as the falling of plaintiff's wall), the period will, under sec. 24, be computed from the time when the injury results. (See Roberts *v.* Reid, 16 East., 215; Goddard, 331; Dwarka *v.* Corporation of Calcutta, I. L. R., 18 Calc., 91).

Sec. 24 when applicable.

As to the exemption of judicial and certain executive acts of public officers, see Act XVIII of 1850; Prahlad *v.* Watt, 10 Bom., 348; and Teyan *v.* Ramlal, I. L. R., 12 All., 115.

Judicial acts.

As to suits against Governors and Members of Council for official acts, see In the matter of Wallace, I. L. R., 8 Mad., 24.]

Official acts of Governors.

Part III.—Six months.

3.—Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property.	Six months	... When the dispossession occurs.

[No. 3. (Sec. 15, Act XIV of 1859; and No. 3, Act IX of 1871).

Not against Government.

No such suit can be brought *against* the Government.

Dispossession.

As to what amounts to possession or dispossession, see Lecture VI, *supra*. Carrying off the produce of land in the occupation of a tenant does not necessarily amount to dispossession. (Seetal *v.* Judoo, 25 W. R., 180). The mere discontinuance of payment of rent by tenants, or even the payment of rent by them to a *third* person does not *necessarily* amount to a dispossession. (See Tarini *v.* Gunga Prosad, I. L. R., 14 Calc., 649; Sarbanund *v.* Pransunkar, I. L. R., 15 Calc., 527; pp. 140, 141, *supra*).

Does this art. apply to easements and profits.

It has been held by the Calcutta High Court that a suit to enforce a right of way by the removal of an obstruction is not a suit under this article. (Haro Dyal *v.* Kristo, 17 W. R., 70). But the correctness of this ruling has been questioned by the Bombay High Court, and it has been held there that a suit for the possession of incorporeal rights (*e.g.*, a private right of fishery *in alieno solo*) is a suit for possession of immoveable property within the meaning of this article (Bhundol *v.* Pondol, I. L. R., 12 Bom., 221). A right of ferry is "immoveable property" within the meaning of Act I, 1868, and therefore of Act I of 1877, and art. 3 of Act XV of 1877. Ferries, fisheries, lights, and rights to ways are "benefits to arise out of land" within the meaning of Acts I of 1868 and III of 1877. When the Legislature intends to exclude such incorporeal rights, it indicates its intention by adding the word "tangible" to the expression "immoveable property." (Krishna *v.* Akilanda, I. L. R., 13 Mad., 54). See pp. 205, 206, 362, 388, 389, *supra;* Bhundal *v.* Rudel, I. L. R., 12 Bom., 221; Parbutty *v.* Madho, I. L. R., 3 Calc., 276. According to O'Kinealy and Ameer Ali, JJ., a right to fish in a khal, the soil of which belongs to another, though a benefit arising out of another's land, is not "immoveable property," and a dispute in regard to such a right is not a dispossession from any immoveable property within the meaning of sec. 9 of the Specific Relief Act. (Natabar *v.* Kubir, I. L. R., 18 Calc., 80). But even before the General Clauses Act of 1868, their Lordships of the Privy Council held that the term "immoveable property" in Act XIV of 1859 included *incorporeal* hereditaments. (See p. 205, *supra*). Art. 10 speaks of physical possession; while art. 3 of Act XV, as well as sec. 9 of Act I of 1877, speaks of possession only. In the Preamble and in Part IV of Act XV of 1877, the term "possession" is used by the Legislature as applicable to easements and profits in the lands of others. Art. 3 of Act XV and sec. 9 of Act I of 1877, would, therefore, seem to be applicable to immoveable property, whether such property is capable of physical possession or not. But according to Petheram, C. J., and Ghose, J., art. 3 of this schedule, and sec. 9 of the Specific Relief Act, are applicable to properties of which actual physical possession can be given and taken. Fisheries, according to these learned Judges, are "immoveable property" within the meaning of the General Clauses Act, but being incapable of *physical* possession, they do not fall within the scope of sec. 9 of the Specific Relief Act. (See Tarine *v.* Gunga Prosad, I. L. R., 14 Calc., 629; Fadu *v.* Gour Mohun, I. L. R., 19 Calc., 544, at pp. 547, 571, F. B.) According to Mr. Justice O'Kinealy, an easement or a profit in the lands of others is not "immoveable property" within the meaning of

sec. 9 of the Specific Relief Act, but only an "*interest* in specific immoveable property." (*Ibid.*, pp. 562, 564 and 565). Prinsep and Pigot, JJ., differed from the majority of the Judges in the Full Bench and held that a suit for the possession of a right to fish in another's *khal* did come within the provisions of sec. 9 of the Specific Relief Act. So long as the decision of the majority is not overruled by the Privy Council or by another Full Bench of the Calcutta High Court, the Courts in Bengal will, of course, follow that decision. (See pp. 114, 205, 206, notes).

Effect of mere previous possession.

Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under sec. 9 of the Specific Relief Act, 1877, which must be brought within six months from the date of dispossession. Khajah Enaetoollah Chowdhry *v.* Kishen Soondru Surma, 8 W. R., 389 ; Eataza Hossein *v.* Bany Mistry, I. L. R., 9 Calc., 140 ; Debi Churn Boido *v.* Issur Chunder Manjes, I. L. R., 9 Calc., 39 ; Kawa Manjee *v.* Khewaz Nussio, 5 C. L. R., 278 ; Wise *v.* Ameerunnissa Khatoon, L. R., 7 I. A., 73 ; Krishnaras Yashvant *v.* Vasudev Apaji Ghotikar, *I. L. R., 8 Bom., 371 ; Pemraj Bhavaniram v.* Narayan Shivaram Khisti, *I. L. R., 6 Bom., 215 ; Mohabeer Pershad v.* Mohabeer Singh, I. L. R., 7 Calc., 591 ; 9 C. L. R., 164, referred to and explained. (Purmeshur Chowdhry *v.* Brijolall Chowdhry, I. L. R., 17 Calc., 256).

The better opinion.

But, as stated in the Lectures (see pp. 162, 163, 335 and 336, *supra*), the better opinion seems to be that mere previous possession for any period is *primâ facie* evidence of title against a trespasser and a wrong-doer, even where the plaintiff sues after the six months allowed by art. 3. (See the remarks of Pigot, J., in the case cited above, at p. 260). So long as the question is not decided by a Full Bench of the Calcutta High Court, the Courts in Bengal will, of course, follow the recent cases in I. L. R., 9 Calc.

Suit *before* the six months.

A suit to recover possession of immoveable property though instituted *within* six months of the dispossession is not necessarily a suit under sec. 9 of the Specific Relief Act. Such a suit may be laid under the general law, to which art. 142 will apply. (Kawamanji *v.* Khowaz, 5 C. L. R., 278, 284 ; Mathooranath *v.* Tarinee, 8 W. R., 164).

Tenant may but agent cannot sue.

A landlord ejecting a tenant, of his own authority, after the expiry of the term of the lease, may be sued under this article. (Jonardun *v.* Haradhon, 9 W. R., 513, F. B.) But an owner of land returning upon his own property cannot be so sued by an agent, who had been put into possession on behalf of such owner. (Madhub *v.* Sham, I. L. R., 3 Calc., 243 ; see pp. 119, 139-141, *supra*).

Partial dispossession.

Partial dispossession of a house, well, &c., is dispossession within the meaning of this article. (Sabopathi *v.* Subraya, I. L. R., 3 Mad., 250). The occupation of a casual trespasser is not possession. If such trespass is not acquiesced in, and the trespasser is immediately ejected, he cannot sue under this article. (7 Bom., 82 ; and pp. 116, 117, *supra*).

Casual trespass.

See pp. 160, 327 and 328, *supra*, for notes on sec. 9 of the Specific Relief Act.]

4.—Under Act No. IX of 1860 (*to provide for the speedy determination of certain disputes between workmen engaged in railway and other public works and their employers*), section one.	Six months ...	When the wages, hire or price of work claimed accrue or accrues due.

[No. 4. (No. 4, Act IX). Magistrates empowered to decide such disputes have jurisdiction in case the amount in dispute does not exceed the sum of two hundred rupees. The special provisions of Act IX of 1860 have been extended to Nadiya and the 24-Pergunnahs. This article does not apply to suits for wages, &c., in districts to which the Act has not been extended by Government.

A complaint brought under Act XIII of 1859 to recover a sum advanced in respect of work, which work was not done, is not governed by any provision of the Limitation Act, which applies to *civil suits* only. (In the matter of Kitten, I. L. R., 11 Mad., 332.)]

5.—Under the Code of Civil Procedure, Chap. XXXIX (*of summary procedure on negotiable instruments*).	Six months	...	When the instrument sued upon becomes due and payable.

[No. 5. (No. 5, Act IX). See secs. 532—537 of Act XIV of 1882. Regular suits on negotiable instruments are provided for by arts. 69 to 80.]

Part IV.—One year.

6.—Upon a Statute, Act, Regulation or Bye-law for a penalty or forfeiture.	One year	...	When the penalty or forfeiture is incurred.

[No. 6. (No. 6, Act IX ; and sec. 1, cl. 2, Act XIV).

This, like every other article, applies only when there are no periods specially prescribed by any special or local law. Penalties and forfeitures are incurred chiefly for offences against the Revenue laws, which, "generally speaking, are not recoverable in the Civil Courts, but are adjudicable by the Revenue Authorities, or in the criminal department." (See the Special Report of the Indian Law Commissioners, dated 26th February 1842).

Penalty and forfeiture.

A penalty is imposed as a punishment upon the defendant, not as compensation to the plaintiff. (Adams *v.* Batley, 18 Q. B. D., 625, 629).

As to the forfeiture of goods bought and sold by inland traders in salt, &c., see 33 Geo. III, c. 52, sec. 137.

This article has nothing to do with suits which are not founded upon a statute, &c. A penalty in a *bond* is not covered by this article. A suit for *possession* of immoveable property to which the plaintiff is entitled *by reason of any forfeiture* or breach of condition is governed by art. 143. A *suit* for a *debt* upon a statute (as for municipal taxes or rates) is *not* a suit for a *penalty*. Art. 120 applies to such suits where they are maintainable. (President *v.* Srikakulopa, I. L. R., 3 Mad., 124. See also I. L. R., 20 Calc., 51, at p. 57).

Suit *by* Secretary of State.

A suit (upon a statute, &c.) for a penalty or forfeiture by, or on behalf of, the *Secretary of State* for India in Council, if not provided for by any special law, is governed by art. 149. The bye-laws passed by the Municipal Commissioners of a place under the authority of some legislative enactment have the force of law.

No debt until judgment.

Special modes of enforcing.

In penal actions no debt is due until judgment. (See p. 14, note, *supra ;* Bullen and Leake, 4th Ed., p. 297). Where a statute provides a special mode of enforcing the penalty, the particular remedy must in general be followed, and no action can be maintained where the statutory provision for the enforcement of the penalty is inconsistent with there being a jurisdiction in the ordinary Courts to entertain

such action. (Bullen and Leake, 297). In the absence of specific provisions in the statute, the Crown alone can maintain a suit for a penalty. A common informer may maintain such a suit only when the statute gives him the right by express words or by sufficient implication. (Bradlaugh *v.* Clarke, 8 App. Cas., 354). In England, in a *Qui Tam* action for a penalty, an informer sues as well for the Queen as for himself.] Common informer.

7.—For the wages of a household servant, artisan or labourer not provided for by this schedule, No. 4.	One year	... When the wages accrue due.	Art. 7.

[No. 7. (No. 7, Act IX ; sec. 1, cl. 2, Act XIV).

In ordinary language, the term wages is usually restricted to the remuneration for mechanical or muscular labour, specially to that which is ordinarily paid at short intervals. (Ogilvie's Imperial Dictionary. See notes to art. 102). If there is an agreement to pay a certain price for the whole of the work done by a painter or a goldsmith, a suit for such price is not a suit for wages under this article (Viraswami *v.* Sayambobay, 2 Mad., 6). A contractor, or sub-contractor, who does not engage in work himself, is not an artisan or a labourer under this article. (Gilby *v.* Subbu, I. L. R., 7 Mad., 100 ; *In re* Balkrishna, I. L. R., 10 Bom., 196). A mookhtear, a manager of a company, or a tahsildar is not a household servant. (See Nitto Gopal *v.* Mackintosh, 6 W. R., 11 ; *In re* Ganges Steam Navigation Company, 2 Ind. Jur., N. S., 181 ; Oroon *v.* Ramanath, 10 W. R., 260. But cf. 5 W. R., S. C., 3). The word "servant" in this article applies to a servant *ejusdem generis* with 'labourer or artisan." Servants in husbandry are labourers. But a man who cultivates another's land in consideration of the occupation of such land and of a portion of the produce thereof is not a labourer employed on wages. (Andi *v.* Venkata, 2 Mad., 387). A person whose duties are to sweep and clean a temple and provide flowers for daily worship and garlands for the idol is not a "household servant or labourer." (Muttirango *v.* Erangot, I. L. R., 7 Mad., 99). A chowkidar may be a servant (Golamee *v.* Paelan, 18 W. R., 298), but he may not be a household servant. An artist, such as a portrait-painter, is not an artisan. (See Viraswami *v.* Sayambabay, 2 Mad., 6). Even an artificer, such as a silversmith or saddler, is not an artisan. A suit by a goldsmith to recover the price of his labour in making ornaments, it has been held, falls under art. 56 (see Starling, p. 85). One who gives instructions in fencing and wrestling for a monthly fee is not a household servant or an artisan. (Pylwan *v.* Jenaka, 8 Mad., 87). There is an idea of vulgarity attached to the term artisan. Suits for wages not falling under this article will generally be governed by art. 102. See also arts. 4 and 101. The date of dismissal of a servant is not the starting point of limitation. (Kali Churn *v.* Mahomed, 6 W. R., S. C., 33). In the absence of a special contract, the wages of a servant on a fixed monthly salary accrue due at the end of each month. (*Ibid.*) This article applies only to suits for wages against the employer. (Siv Ram *v.* Turnbull, 4 Mad., 43.)] Price for *whole* work, not wages. Who are or are not household servants, artisans or labourers. Starting point of limitation.

8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging-house.	One year	... When the food or drink is delivered.	Art. 8.

[No. 8. (No. 8, Act IX ; sec. 1, cl. 2, Act XIV). A tavern is a house usually licensed to sell liquors in small quantities.]

Art. 9.	9.—For the price of lodging.	One year	... When the price becomes payable.

[No. 9. (No. 9, Act IX ; sec. 1, cl. 2, Act XIV). In the absence of contract or special custom, daily or weekly payments fall due at the end of each day or week. A suit for house-rent is not a suit for the price of lodging. Every lodger is to some extent a tenant. Where exclusive possession of the whole or a specific part of a house has been let to the defendant for a determinate period, the suit is for rent. (See Woodfall on the Law of Landlord and Tenant, 12th Ed., pp. 80, 115, 210 and 415). Cf. art. 110.]

Part IV.—One year.

Art. 10.	10.—To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	One year	... When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold ; or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.

[No. 10. (No. 10, Act IX ; sec. 1, cl. 1, Act XIV)

Sec. 7 (disability), and sec. 17 (death before right to sue accrues) are inapplicable to suits to enforce rights of pre-emption.

Pre-emption in cases of mortgages foreclosed.

It has been held by a Full Bench of the Allahabad High Court that the sale referred to in art. 10 must be an *absolute* one, having immediate effect and operation, either by physical possession or by the creation of a title under an instrument duly registered. (Nathu *v.* Ram, I. L. R., 4 All., 218). A pre-emptor objecting to a conditional sale that has become absolute would, in this view, have a limitation of six years under art. 120. (*Ibid.*) And the six years would run from the time when the mortgagee's title as absolute owner is established, and he is placed in a position at any moment to obtain possession as absolute owner. (Rasik Lal *v.* Gajraj Sing, I. L. R., 4 All., 414 ; Udit *v.* Padarath, I. L. R., 8 All., 54 ; Binda *v.* Kaunsilia, I. L. R., 13 All., 126, at p. 146). But according to the Calcutta High Court, art. 10 applies to such cases, and the one year is counted from the date when the conditional purchaser takes physical possession, on the conditional sale becoming absolute by foreclosure. (Digamber *v.* Ramlal, I. L. R., 14 Calc., 761). Mr. Starling questions the correctness of the rulings of the Allahabad Court on this point (2nd Ed., p. 111). In the Central Provinces, Nathu *v.* Ram is not considered applicable except where the property mortgaged and sold is only an interest in an *undivided* mehal. (Fatichand *v.* Dinanath, 4 Cent. Prov. L. Rep., 72). If a mortgagee in possession purchases the property, his possession *as purchaser* or absolute owner commences from the date of the purchase. (Lachmi *v.* Sheoambai, I. L. R., 2 All., 409). A conditional sale becoming absolute does not necessarily transfer the possession to the mortgagee. (See Prag *v.* Bhajan, I. L. R., 4 All., 291).

Sale of share in a suit.

The sale of a *share in a suit* to be instituted for recovery of property is not a sale of *property* to which a right of pre-emption can attach.

(Abdul *v.* Shaluka, I. L. R., 20 Calc., 496, P. C.) Even a permanent lease is not a sale. (Dewanatulla *v.* Kazum, I. L. R., 15 Calc., 184. But cf. Gobind *v.* Inayetullah, I. L. R., 7 All., 775). A right of pre-emption, founded on the Mahomedan law, does not attach to a lease, whether permanent or temporary (Babooram *v.* Nursing, 25 W. R., 43); nor to a conditional sale until it is completed or rendered absolute (Gurudyal *v.* Teknarain, 2 W. R., 215; Buksha *v.* Tofer, 20 W. R., 216); nor to property sold in execution, except as laid down in sec. 310 of the Civil Procedure Code (Abdul *v.* Khellat, 10 W. R., 165). This article does not apply to a suit to enforce a preferential right of becoming the mortgagee or lessee of property. A suit to enforce a right of pre-mortgage is governed by art. 120. (Nath *v.* Ram, I. L. R., 4 All., 218, F. B.; Alu *v.* Sukhan, I. L. R., 3 All., 600, 630, F. B.) Custom or contract may give a person a right of pre-mortgage or pre-lease. (See Ashik *v.* Mathura, I. L. R., 5 All., 187). But such rights are not rights of pre-emption. The language of art. 110 is not inapplicable to sales of moveable property.

Leases.

Pre-mortgage and pre-lease.

Under Act XIV of 1859, the starting point was the date of taking *possession;* under Act IX of 1871, it was the date of taking *actual possession;* but under this Act, it is the date of taking "physical possession." There can be no physical possession of an intangible thing, such as a right to a reversion, or a right of redemption of property in the usufructuary possession of a mortgagee. (See the judgment of Stuart, C. J., in Jageshar *v.* Jawahir, 1 All., 311, and sec. 54 of the Transfer of Property Act). The term "physical" implies some corporeal or perceptible act done which by itself conveys, or ought to convey, to the mind of the claimant, notice that his right has been prejudiced. (Shiam *v.* Amanant, I. L. R., 9 All., 234). If constructive possession were in general sufficient, it would be impossible for intending claimants to know of the existence of rights inimical to their own. (Beebee Fatima *v.* Gossain Gobind, 2 W. R., 5). Messrs. Sheppard and Brown are apparently of opinion that actual entry on the land sold, and occupation of it visibly taken by the purchaser is "physical possession" of land, within the meaning of art. 10. (See Commentaries on the Transfer of Property Act, 3rd Ed., p. 135).

Physical possession.

Taking visible and tangible possession of property, or materially enjoying the rents and profits thereof, is taking actual possession. Receiving rents from the tenants of an estate is actual possession of tangible immoveable property within the meaning of sec. 145 of the Criminal Procedure Code of 1882. (In the matter of Sarbanando, I. L. R., 15 Calc., 527). What is often called possession in this country is not actual or khas possession, but the receipt of the rents and profits. (Mullick *v.* Muleka, I. L. R., 10 Calc., 1112, 1124). It may be mentioned here that the right of pre-emption on the ground of vicinage (under Mahomedan law) does not extend to estates of large magnitude, but only to houses, gardens and small parcels of land. (Shah Mahomed *v.* Shah Mohann, 14 W. R., F. B., 1). It has been held by the Allahabad High Court that an undivided share of a puttidari estate under the management of the lumberdar is not susceptible of *physical* possession. (Unkar *v.* Narain, I. L. R., 4 All., 24, F. B.)

Actual possession.

Undivided share of puttidari estate.

Physical possession of the *whole* of the property sold must be taken before limitation commences to run under the first portion of this article. (See Bholi *v.* Iman, 1. L. R., 4 All., 179; Jaikaran *v.* Gunga, I. L. R., 3 All., 175). The purchaser cannot be said not to obtain actual possession where he is only opposed in taking possession by

Physical possession of *whole.*

some one who has no right to oppose his possession, as a mere farmer who was tenant of the vendor. (Bechun *v.* Mahomed, 3 W. R., 225).

Suit *before* possession.

There is nothing to prevent the pre-emptor from bringing his action immediately after the sale, and before the transfer of possession. (See Lekranee *v.* Jankee, W. R., Gap No., 285).

Suits not provided for by this article.

This article does not provide for the case where the property does not admit of physical possession, and being under Rs. 100 in value is conveyed by an unregistered instrument. (Stokes, Vol. II, p. 977). But such cases can hardly arise in Provinces to which the Transfer of Property Act, 1882, applies. Under sec. 54 of that Act, in the case of tangible immoveable property of a value *less* than one hundred rupees, a sale may be made either by a registered instrument or by delivery of the property. In such a case an *unregistered kobala* (without delivery of possession) does not transfer the ownership. (Makhan *v.* Bunku, I. L. R., 19 Calc., 623). Art. 120, it is apprehended, was intended to apply to such a case.

The period of limitation as between two rival claimants of the right of pre-emption is that provided by art. 120. One of the two may be added as a co-defendant in the suit of the other, even after the one year allowed by this article. (Durga *v.* Haidar, I. L. R., 7 All., 167). Art. 120 applies also to the right of pre-mortgage.

Where by the terms of the lease a tenant is bound to offer his holding to the landlord before selling it to another, a sale in contravention of this condition precedent, is *ultra vires*, and the landlord may bring a suit to set it aside. Art. 10 does *not* apply to such a suit. (Umrav *v.* Davlat, 1 Cent. Pro. L. Rep., 53; Pendara *v.* Hira, *ibid.*, 132).

Every sale of intangible real property (which is incapable of physical possession) must, under sec. 54 of the Transfer of Property Act, be made by a registered instrument, and art. 10 *does apply* to such a sale.

The date of endorsing the certificate of registration is the date of registration. (Sec. 60, Act III of 1877).

Defendant's right of pre-emption.

To assert a right of pre-emption is not necessarily to sue for possession within the meaning of sec. 28. If the defendant is in possession of the property under a mortgage, and the mortgagor then sells the property subject to the mortgage to the plaintiffs, supposing the defendant has the right of pre-emption, the plaintiffs in a suit to redeem or recover the property under the deed of sale cannot succeed even if the defendant has neglected to assert his right of pre-emption within the prescribed period. It is not necessary for the defendant to institute a suit for possession. Even if a suit by the defendant to compel the plaintiffs to convey the property to him on his paying the price they have paid, is barred, that would not extinguish his right under sec. 28. (Kanharankutti *v.* Uthotti, I. L. R., 13 Mad., 490). Sec. 28 does not apply to the case of defendants who rely on an actual possession which has never been disturbed. (Hargovandas *v.* Bajibhai, I. L. R., 14 Bom., 222).]

Art 11.	11.—By a person against whom an order is passed under secs. 280, 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	One year	... The date of the order.

[No. 11. (Secs. 246 and 269, Act VIII of 1859). *Reddendo singula singulis*, the words in the first column may be read thus: "By a person against whom an order is passed, under secs. 280, 281 and 282 of the Code of Civil Procedure, to establish his right to the property comprised in the order, or by a person against whom an order is passed under sec. 335 of the Code of Civil Procedure to establish his right to the present possession of the property comprised in the order." Reading the article thus, its language will correspond to the provisions of sec. 283 and the second para. of sec. 335 of the Code of Civil Procedure. Section 283 speaks of a suit to establish the right to any property which the plaintiff claimed in a proceeding under secs. 280, 281 or 282. Section 335 speaks of a suit to establish the right which the plaintiff claimed to the present possession of the immoveable property in dispute, in a proceeding under that section. The right referred to in sec. 283 is the right to have the property in dispute sold in execution of the decree, or to have it released from the attachment in the case. (Kedar *v.* Rakhal, I. L. R., 15 Calc., 674, 679). If one of the objects of the suit is to establish a *different* right, it is not, so far, governed by this article. (Bukshi *v.* Sheo Procash, I. L. R., 12 Calc., 453). As to the difference between a suit to establish a right to present possession, and a suit to establish a right generally, see Rangoo *v.* Rikhivandas, 11 Bom., 174.

The right to property, or the present possession.

This article applies even if the suit is for recovery of possession, or for confirmation of possession, of the property (in the *same* right) in respect of which an adverse order under sec. 281 has been made in the execution department. (Shiboo *v.* Mudden, I. L. R., 7 Calc., 608; Brijo *v.* Ram, 21 W. R., 133). Although art. 11 does not mention suits for recovery of possession, after adverse orders under sec. 281, such suits, if instituted after the one year allowed by the article, must be dismissed on the ground that the plaintiff's title is extinguished by the joint operation of sec. 283 and art. 11. (See pp. 86, 165, 329, *supra*).

Suit for recovery of possession.

Under Act VIII of 1859 it was held that the claim sections applied only to specific property, and not to money debts attached in execution. (Rambutty *v.* Kamessur, 22 W. R., 36; Harilal *v.* Abhesang, I. L. R., 4 Bom., 323). An order under sec. 281, in execution of a decree of a Court of limited jurisdiction, where it is on the face of it without jurisdiction, may be treated as void, and need not be set aside. (Lala *v.* Habib, 15 W. R., 311).

Money debts.

Void orders.

Sections 280, 281 and 282 of the Code correspond to sec. 246 of Act VIII of 1859; and sec. 335 of the Code, to sec. 269 of Act VIII of 1859. Under Act VIII of 1859 the one year's limitation applied to suits of this class. Act IX of 1871 repealed the limitation-clause of sec. 246, Act VIII, and did not re-enact it. The editor of the Indian Statute Book was of opinion that the general limitation of six years under art. 118, Act IX, applied to such suits. The Bombay High Court was of opinion that one year's limitation under art. 15 of that Act applied. The Calcutta High Court held that, in the case of claims to land, the twelve years' limitation applied. (See the cases quoted below). Even now an order passed under sec. 246 or sec. 269 of Act VIII of 1859 is not governed by this article. (See p. 187, *supra*; and Luchi *v.* Assrup, Bessessur *v.* Murli, and Gopal *v.* Mohesh, I. L. R., 9 Calc., 43, 163 and 230, and Rashbehary *v.* Buddun, 12 C. L. R., 550). The limitation prescribed for an ordinary suit to establish any right to property (three, six or twelve years, as the case may be) applies to suits by persons against whom such an order has been passed. (See Durgaram *v.* Nundocoomar, 1 Shome, 26; Sreenath *v.* Ramkanye, 2 Shome, 160; Koylash *v.* Preonath, I. L. R., 4 Calc., 610; I. L. R.,

Law before Act XV.

Suits under this Act against orders under sec. 246 or 269, Act VIII of 1859.

Under Act IX of 1871.

9 Calc., 164, 230 ; I. L. R., 12 Mad., 294, 296). It has been held by the Madras High Court that when Act IX was in force, a suit for possession after an adverse order under sec. 246 of Act VIII of 1859 was not governed by the one year rule of limitation. (Narasimma *v.* Appala, I. L. R., 12 Mad., 294). The Bombay High Court, however, have held (see Krishnaji *v.* Bhaskar, I. L. R., 4 Bom., 611) that, under Act IX of 1871, art. 15 (corresponding to art. 13 of this Act) applied to such a suit in respect of an order under sec. 246 of Act VIII of 1859. Markby, J., in Shome I, and Jackson, J., in Shome II, pointed out that the summary order passed under sec. 246, Act VIII of 1859, could not be recalled, and setting it aside was of no advantage to the plaintiff, who was entitled to bring a regular suit notwithstanding the summary order. It has been subsequently held in Calcutta, that a suit to establish right under sec. 246 of Act VIII of 1859, or under secs. 278-283 of Act XIV of 1882, is *not* necessarily a suit to *set aside* an *order* (Gend Lall *v.* Denonath, I. L. R., 11 Calc., 673. See also I. L. R., 9 Calc., 43 and 163). But sec. 283 of Act XIV of 1882 now says that, subject to the result of such suit, the order shall be conclusive. And even under Act VIII of 1859 the effect of a decree of the decree-holder's suit was to set aside the order of release from attachment (Mahomed *v.* Pitamber, 21 W. R., 435). The Madras, Bombay, and Allahabad High Courts have held that a suit brought to establish right under the claim sections of the Civil Procedure Code is a suit to set aside an order. (Settiapan *v.* Sarat, 3 Mad., 220 ; Krishnaji *v.* Bhaskar, I. L. R., 4 Bom., 611 ; Badri Prasad *v.* Mahammad, I. L. R., 1 All., 381).

Is the suit for *setting aside* the order.

12 years' possession against judgment-debtor ending at date of *order*, extinguishes his title.

The suit being one to set aside the order in the claim case, it must be determined by the rights of the parties at the *date of such order.* Twelve years' adverse possession of what was really the property of the judgment-debtor extinguishes his right to such property in favor of the claimant. But the decree-holder's suit to establish his judgment-debtor's right to the property must be decreed if the 12 years' adverse possession is completed only at the date of the suit, but not at the date of the order in the claim case. (Harishanker *v.* Naran, I. L. R., 18 Bom., 260).

Policy of art. 11.

The policy of the law evidently is to secure the speedy settlement of questions of title raised in execution proceedings, and for that reason a year is fixed as the time within which a suit under sec. 283, Act XIV of 1882, must be brought. (Sardharilall *v.* Ambica, I. L. R., 15 Calc., 521, P. C.) A suit under sec. 283 is in substance a suit brought to reverse the order in the execution proceedings, and it requires some strong evidence to overturn such order. (Alexander *v.* Mathura, I. L. R., 8 All., 6, P. C.)

Orders by Calcutta Small Cause Court.

No suit is maintainable in any Court against an order under secs. 280, 281 and 282 of the Code passed by the Small Cause Court of Calcutta. (Ismail *v.* Mahomed, I. L. R., 18 Calc., 296). Under the rules of the Court a claim case is tried as a *suit*, and the claimant has to file a *plaint*. Sec. 283 of the Civil Procedure Code which empowers the party against whom an order under secs. 280, 281 or 282 is passed, to institute a suit to establish the right which he claims to the property in dispute, does not apply to claim cases in the Calcutta Court of Small Causes. (*Ibid.*)

Investigation of objection.

This article does not apply, unless the order is passed after making an investigation as prescribed by the Civil Procedure Code. (See Jugobundhoo *v.* Sacya, 16 W. R., 22 ; Venkapa *v.* Chenbasapa, I. L. R., 4 Bom., 21 ; Rasbehary *v.* Buddun, 12 C. L. R., 550 ; Chundra *v.* Ram Kantto, I. L. R., 12 Calc., 108). If the claim case is struck off for default, and no order is passed under secs. 280, 281 or 282, this article does not apply. (Kallu *v.* Brown, I. L. R., 3 All., 504).

Where the Court disallows a claim by reason of the claimant not having given evidence in support of his claim, the order is an order to which the article applies. (Sreemunto *v.* Syud Tajooddeen, 21 W. R., 409 ; Tripoora *v.* Ijjutoonissa, 24 W. R., 411). See also B. Hetnarain *v.* Pultoo, 1 Shome's L. Rep., 173. There is no reason whatever for drawing any distinction between a case in which the claimant produces evidence which is rejected as unworthy of credit, and a case in which he altogether fails to produce any evidence in support of his claim. (Gooroodass *v.* Sonamonee, 20 W. R., 345). An order striking off an application on applicant's *failure to adduce evidence* has been treated as an order against the applicant, and governed by this article. (Sadut *v.* Ramdhone, 12 C. L. R., 43). An order allowing the claimant to withdraw his application can *not* be treated as an order *against* the claimant. (See Bhika *v.* Sakarlal, I. L. R., 5 Bom., 440). A mere refusal to postpone the sale of property attached in execution, without any investigation into the claim preferred, is not an order to which the article applies. (Sah Mukkun *v.* Sah Koondun, 15 B. L. R., 228, P. C. ; 24 W. R., 75). Where the boundaries of the attached property given by the decree-holder differ from those mentioned in the claimant's *kobala*, and the Court reject the claimant's prayer *because* the sale is not likely to affect his interest, the order is *not* passed after making an investigation. (I. L. R., 12 Calc., 108). The extent to which the "investigation" should be carried depends upon the circumstances of the case. When a Court acting within its jurisdiction makes an order releasing the attached property under sec. 280, this article will apply irrespective of the extent of the "investigation." (Sardharilall *v.* Ambica, I. L. R., 15 Calc., 521, P. C.) If no investigation is made on the ground that the claim is designedly or unnecessarily delayed, the article does not apply. (Syed Mahomed *v.* Kanhya, 2 W. R., 263 ; Venkapa *v.* Chenbasapa, I. L. R., 4 Bom., 21 ; and p. 186, *supra*). There must be an order given *against* one party or the other. An endorsement made by the Court on the claimant's application *acquiescing* in the claimant's request that this application should not be further proceeded with is not such an order. (Bhikha *v.* Sakarlal, I. L. R., 5 Bom., 440).

Rejection of claim on failure to give evidence.

Orders without *any* investigation.

Order *against* a party.

Where the claim to property attached is neither admitted nor rejected, but intimation of it is given at the time of sale, the article does not apply. (Baboo Jodoonath *v.* Radhamonee, 7 W. R., 256, F. B.)

The article does not also apply where no claim or complaint has been preferred in the execution department. (See Lalchand *v.* Lakharam, 5 Bom., 139 ; Babu Pertab *v.* Babu Brojolal, 7 W. R., 253, F. B.)

The "person against whom an order is passed under secs. 280, 281 or 282" is either the decree-holder or the claimant. (Mannu *v.* Harsukh, I. L. R., 3 All., 233 ; Bhyrub *v.* Meer Abdool, 8 W. R., 93). The judgment-debtor is not bound by the order except where he is actually made a party to the proceeding. (Imbichi *v.* Kakkunnat, I. L. R, 1 Mad., 391 ; Shivapa *v.* Dod, I. L. R., 11 Bom., 114). It is for the person who sets up the special bar of limitation under art. 11, against the judgment-debtor, to show that he was a party to the claim case and that the order passed was an order against his interest. (Guruva *v.* Subbarayudu, I. L. R., 13 Mad., 366). The order is not against the judgment-debtor where he charged that the successful claimant was his mortgagee in possession. (See Cheriyalakol *v.* Vagaka, 6 Mad., 416). A suit by the judgment-debtor to establish his right to the property in dispute, or to recover possession thereof, is not

Is judgment-debtor, party to, and bound by, order.

such a suit as is contemplated by the first portion of this article. It is not a suit to establish the right claimed in a proceeding under secs. 280, 281 or 282. Nor is it a suit by "a person against whom" an order has been passed under one of those sections. (Kedar *v.* Rakhal, I. L. R., 15 Calc., 674, 679). A party suing in his own character is not bound by an order against him in a representative character. (Kalimohun *v.* Anundomoni, 9 C. L. R., 18). The date of the order is the date on which it is signed, not that on which it is verbally made. (Bapu *v.* Laksman, 10 Bom., 19). A second claim by the same person and a second order by the Court cannot prevent the operation of limitation as regards the order disallowing the first claim. But the withdrawal of the attachment may lead to that result. (See below).

Date of order.

Orders, conclusive if not set aside within one year.

Orders passed under secs. 280, 281 and 282 of the Civil Procedure Code are *conclusive* on all the parties unless overruled by regular suit under this article. (See p. 86, note (10), *supra;* Velayuthan *v.* Laksmana, I. L. R., 8 Mad., 506; Yashvant *v.* Vithoba, I. L. R., 12 Bom., 231; Burjorji *v.* Dhanbal, I. L. R., 16 Bom., 1, at p. 11). The same rule applies to orders under sec. 335. (Achuta *v.* Mammavu, I. L. R., 10 Mad., 357). In Badri Prosad *v.* Muhammed (I. L. R., 1 All., 381) a Full Bench of the Allahabad High Court held that if the party against whom an order is passed under sec. 246 of Act VIII of 1859, or secs. 280-282 of the Civil Procedure Code now in force neglects to establish his *right* for one year after the date of the order, he shall be *precluded* from asserting his right even as a defendant. This ruling has been followed in Madras and Bombay. It has been held in the Central Provinces also, that if an order disallowing a claim is not set aside within the one year allowed by art. 11, it becomes *conclusive*, and the decree-holder as well as the auction-purchaser can always produce such an order in bar of the claimant. (Adjoodhya *v.* Sheo Dass, 1 Cent. Prov. Law Rep., 3).

A summary award in respect of possession under the law corresponding to sec. 145 of the Criminal Procedure Code, or a summary order under the claim sections of the Civil Procedure Code, being conclusive unless set aside by civil suit within the prescribed period, the party against whom such order or award is made is, after the prescribed period, precluded from asserting his right although he is a defendant and is in possession of the property in dispute. (See Bapu *v.* Baji, I. L. R., 14 Bom., 372, at pp. 376, 377, and pp. 86, 165, 329, *supra*). In Khublall *v.* Ramlochun, I. L. R., 17 Calc., 260, at p. 262, Petheram, C. J., and Norris, J., held that the effect of an order disallowing a claim to attached property is to give the auction purchaser a *title* as against the claimant unless the order is set aside by suit, and a suit for that purpose can only be brought within a year from the date of the order. In Gendlall *v.* Denonath, I. L. R., 11 Calc., 673, Sir Richard Garth, C. J., was of opinion that so long as the prescribed period of one year did not expire, the summary order itself did not create any *estoppel*. In Babun Het Narain *v.* Pultoo (1 Shome's Law Reporter, 173), Ainslie and Mitter, JJ., held that if a regular suit is not brought to set aside an order rejecting a claim, within one year from the date thereof, the claimant's right to the property supposing he had any such right, is *extinguished*. But in 2nd Appeal No. 604 of 1893, decided by Petheram, C. J., and Ghose, J., on the 19th May 1893 (Nuffer Chunder Dass *v.* Brindabun,) the learned Chief Justice was distinctly of opinion that in a regular suit instituted by the decree-holder against the claimant, if the latter as defendant is able to give good evidence of his title, the plaintiff cannot be allowed to urge that the claimant is *estopped* from pleading or proving his title, by reason of his neglect to set aside the order rejecting his claim within

one year of its date. The judgment delivered in this unreported case was not, however, a considered judgment, and cannot be treated as overruling the numerous reported decisions of the several High Courts on this subject.

Where *not* conclusive.

A purchase of the judgment-debtor's property during attachment, though void and insufficient to entitle the purchaser to obtain an order of release, may be validated by the subsequent payment of the judgment-debt and consequent withdrawal of the attachment. (Umesh *v.* Raj Bullabh, I. L. R., 8 Calc., 279). The claim in such a case is *not* considered as "disallowed under sec. 281." Where the attachment, in respect of which an order under sec. 281 is passed, is (by reason of the decree being satisfied or otherwise) finally withdrawn, before the expiration of one year, the claimant is not concluded by the order against him. (Ibrahim *v.* Kabula, I. L. R., 13 Bom., 72). A purchased at an execution sale the property of B, the judgment-debtor, which had been attached in March 1879. The same property was attached in execution by another person as the property of C, and B's claim under sec. 280 was rejected in August 1879. B neglected to sue within the year allowed by art. 11. Held, that as the property had been attached in the first execution before B's claim was rejected, A was not affected by B's omission to sue to establish the right claimed by him in the other execution case. (Payaha *v.* Padmapa, I. L. R., 11 Bom., 45).

Rival creditors or claimants.

A suit between rival attaching creditors or between rival intervening claimants of the attached property is not governed by this article. (Chintamoni *v.* Iswar, 3 B. L. R., App., 122; Doorgaram *v.* Raj Nursing, 11 W. R., 134).

Orders under sec. 332.

Section 332 of the Civil Procedure Code allows a party against whom an order is passed under that section to bring a regular suit to establish his right to the present possession of property, but such a suit is not governed by this article. (See Ayyasami *v.* Samiya, I. L. R., 8 Mad., 82). It was held in this case that an order under sec. 332 need not be set aside; but as the section says that the order shall be final, if a suit to establish right is not brought, it is apprehended that a suit under that section is in substance a suit to reverse the summary order. (See p. 658, *supra*, I. L. R., 8 All., 6, P. C. and p. 668, *infra*).

Other arts. not affected by this, nor this by others.

This article or any other article cannot save a suit brought within the time prescribed by it from any bar arising out of any other provision of the law. Thus, if a person, who has been out of possession of property for more than twelve years, puts in a claim under sec. 278 of the Civil Procedure Code, and his claim being rejected under sec. 281 he brings a suit to establish his right within one year of the order of rejection, although the suit is not barred by art. 11, the plaintiff's rights may have been extinguished by twelve years' dispossession. So again, if the property attached in execution is not released under sec. 280, Civil Procedure Code, but sold by order of the Court, the unsuccessful claimant must bring his suit within one year from the date of the order under sec. 281, and the subsequent sale will not give him a fresh start. (See Settiappan *v.* Sarat, 3 Mad., 220. See also Shiboo *v.* Muddon, I. L. R., 7 Calc., 608). Even if the suit be instituted within one year of the sale under art. 12, it will be barred under art. 11, if not brought within one year of the rejection of the claim. (Cf. Furguson *v.* Nilkomul, 23 W. R., 270). The fact that the plaintiff's suit is within time under the other articles of the schedule does not relieve him from the necessity of bringing his suit within one year of the adverse order under the sections mentioned in this article. (Tilok *v.* Sadaram, 7 N. W. P., 113).]

12.—To set aside any of the following sales :— (*a*) sale in execution of a decree of a Civil Court; (*b*) sale in pursuance of a decree or order of a Collector or other officer of revenue; (*c*) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (*d*) sale of a patni taluq sold for current arrears of rent. *Explanation.*—In this clause "patni" includes any intermediate tenure saleable for current arrears of rent.	One year	... When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.

[No. 12. (No. 14, Act IX ; sec. 1, cl. 3, Act XIV). This article does not apply where the suit is not substantially a suit to set aside a sale of one of the kinds mentioned in this article. Thus, a suit to recover property by setting aside a certificate of sale, which wrongly included rights and interests which had not been really sold, is not governed by this article. (Baboo Pertaub *v.* Baboo Brojolall, 7 W. R., 253, F. B. ; Bheem *v.* Khoobun, 17 W. R., 429). A suit to recover what has been taken in excess of what has been really sold is not a suit to set aside the sale. (Musst. Shureefatunnessa *v.* Lachmi, 7 N. W. P., 288 ; Gour *v.* Shunkoree, 13 W. R., 459). Where the rights and interests of a judgment-debtor have been sold in execution, a third person suing to recover the property on the ground that the property or a share of it belongs to him, need not, and cannot properly, claim to *set aside* the sale. (Suryanna *v.* Durji, I. L. R., 7 Mad., 259 ; Nothu *v.* Badridas, I. L. R., 5 All., 614 ; Tonoo *v.* Moheshur, 24 W. R., 302 ; Kripanath *v.* Nitokalee, 8 W. R., 358). A plaintiff suing in his own character is not bound by this article to sue to set aside a sale of property in execution against himself in a representative character. He may sue merely to recover the property. (Kalimohun *v.* Anundmonee, 9 C. L. R., 18). A sebait succeeding to the management of an endowment *per formam doni* is not bound to set aside an execution sale of the right of (his father) the preceding sebait in the management. (Trimbak *v.* Narayan, I. L. R., 7 Bom., 188). The management of the endowment, *i.e.*, the trust reposed in the sebait cannot be attached and sold. (*Ibid.*)

What suits are *not* suits to *set aside* sales.

It has been held by the Madras High Court that where the property itself (and not merely the interest of a particular person) may be, and has been, sold, the sale must be set aside under this article before the property can be recovered, although the plaintiff was no party to the proceeding under which the sale took place. (Suryanna *v.* Durji, I. L. R., 7 Mad., 258). The rule is that art. 12 applies only to cases in which the plaintiff would be bound by the sale if he did not succeed in getting it set aside. (Vishnu *v.* Ramchandra, I. L. R., 11 Bom., 130 ; Narasimma *v.* Appala, I. L. R., 12 Mad., 294, 296. See also Khetsing *v.* Musst. Radha, 3 Cent. Prov. L. Rep., 162). A suit brought merely to confirm the plaintiff's title and to restore him to possession may be substantially a suit to set aside the sale of the plaintiff's interest if the plaintiff cannot be put into possession until that sale has been set aside. See Baboo Pertaub *v.* Baboo Brojolal, 7 W. R., 253, at p. 255, F. B.

Art. 12 when applicable.

A suit under this article is not necessarily a suit by the judgment-debtor or by the former owner of the estate or tenure. A regular suit by an auction purchaser asking to be put in possession of the land within the described boundaries (such boundaries having been wrongly stated in the sale proclamation) or that his purchase-money may be returned, is substantially, or in effect, a suit to set aside the auction sale and is governed by this article. (Mahomed *v.* Novroji, I. L. R., 10 Bom., 214). Even *purchaser* may sue to set aside sale.

A suit to set aside a sale presupposes that the sale is not void, and that if it is not set aside, it will be binding on the plaintiff. If the plaintiff's rights and interests have been sold, and he was not properly represented in the proceeding which led to the sale, he is not bound by the sale. If the sale is held by a Court or officer, without jurisdiction, it is *ipso facto* null and void. If, again, the Court or officer has no right or authority to make the sale at the time it is made, the sale is absolutely void. A non-compliance with the provisions of the law relating to the sale may amount to more than a mere irregularity, and vitiate the sale altogether. But the correctness of the last, if not of the last two, proposition has been recently questioned. Where a suit to set aside a sale (of any of the four specified kinds is maintainable, art. 12 applies, if the sale is not void, but voidable, and if art. 95 or some other article does not give the plaintiff a longer time. (See the cases cited below). Where sale is void or not binding. Where art. applies.

When a decree-holder purchases the judgment-debtor's property at a sale held in execution of his own decree, the sale may, on application, be set aside by the Court executing the decree, under sec. 294 of the Civil Procedure Code, on the ground that the purchase was made without the express permission of the Court. An execution sale may also be set aside, on the application of the auction purchaser, under sec. 313, on the ground that the judgment-debtor had no saleable interest in the property sold. Under sections 244 and 312 of the Civil Procedure Code certain suits to set aside an execution sale are not maintainable. (See Vira Raghava *v.* Venkatacheryar, I. L. R., 5 Mad., 217; Mohendro *v.* Gopal, I. L. R., 17 Calc., 769, F. B.; Prosunno *v.* Kalidas, I. L. R., 19 Calc., 683, P. C.; Bhim Singh *v.* Sarwan, I. L. R., 16 Calc., 33). Where regular suit to set aside execution sale does not lie.

A sale confirmed under the Civil Procedure Code binds the parties to the suit and the purchaser. An application to set aside an execution sale on the ground of irregularity in publishing or conducting the sale may be made under sec. 311 of the Civil Procedure Code. Sec. 312 of the same Code distinctly bars a suit to set aside, on the ground of irregularity, an order confirming the sale, even when no application has been made under sec. 311 to have it set aside. A regular suit to set aside an execution sale on such ground is not maintainable. (Bhim Singh *v.* Sarwan, I. L. R., 16 Calc., 33. But cf. Sreemunto *v.* Obhoy, 11 W. R., 297). In the case of a revenue sale confirmed by the Commissioner under sec. 25 of Act XI of 1859, a regular suit to set aside the sale does lie under sec. 33 of that Act.

If a reversionary heir was not honestly represented by the widow (Parekh *v.* Baivakhat, I. L. R., 11 Bom., 119), or if a minor was not properly represented by his legal guardian in the suit, the subsequent decree, or a sale under it, is not binding on him. (Vishnu *v.* Ram, I. L. R., 11 Bom., 130; Dajihunat *v.* Dhiraj, I. L. R., 12 Bom., 18). Where sale not binding.

A sale in execution of a decree, which is barred by limitation at the date of sale, may be set aside, if the decree-holder himself purchases at the sale. Such a case occurs when the judgment-debtor's plea that execution is barred by limitation is held to be Sale under barred or reversed decree.

a good plea on an appeal decided after the sale. (Mina Kumari *v.* Juggat, I. L. R., 10 Calc., 220).

The subsequent reversal of the decree, in execution of which property is sold, does not give the judgment-debtor a fresh start from the date of such reversal. If his suit to set aside the sale is maintainable, it must be brought within one year as provided in this article. (Parshadi *v.* Mahomed, I. L. R., 5 All., 573).

Bonâ fide purchasers.

Bonâ fide purchasers for valuable consideration and without notice are not in every case protected from having the sale set aside in a regular suit. Each case is to be decided upon its own merits in accordance with the principles of justice, equity, and good conscience. (Abdool *v.* Nawab Raj, 9 W. R., 196, F. B.) The subsequent reversal of the decree does not *per se* render the sale invalid as against such a purchaser. (Jan Ali *v.* Jan Ali, 10 W. R., 154. Cf. I. L. R., 2 Bom., 540).

Sale without jurisdiction.

This article does not apply to a sale held by a Court or by a Collector, without jurisdiction (Sriman *v.* Yamuna, I. L. R., 5 Mad., 54), for such a sale is not merely voidable, but void *ab initio*. (See Lala Mobaruk *v.* Secretary of State, I. L. R., 11 Calc., 200, at p. 211 ; Ramlall *v.* Bama Sundari, I. L. R., 12 Calc., 307, 311).

Sale under satisfied decree.

Where one of two judgment-debtors purchased the decree in the name of another person, and such purchase had the legal effect of satisfying the judgment-debt, a suit by the other judgment-debtor to recover his property which had been sold in execution at the instance of the benamidar was held to be substantially a suit to set aside the sale. The sale was not *ipso facto* void by reason of the judgment-debt having been satisfied, but was (at best) voidable at the instance of the plaintiff. (Abul *v.* Abdool, I. L. R., 2 Calc., 98). In later cases it has been held that where property is sold by a competent Court, even in execution of a decree which has been anyhow satisfied, and purchased by a *bonâ fide* purchaser, the sale cannot be avoided or set aside on the ground that the decree was inoperative against the owner of the property. (Mothura *v.* Akhoy, I. L. R., 15 Calc., 557 ; Rewa *v.* Ram, I. L. R., 15 Calc., 18, P. C.)

Sales under Beng. Certificate Act.

But a certificate of a public demand under Bengal Act VII of 1880 against the predecessors of the defaulting proprietors can *not authorize* the attachment and sale of the defaulter's property, although the names of their predecessors are (notwithstanding a mutation in the Land Register) entered in the certificate by a mistake of the Collector's *amlah*. If, again, the defaulter pays in time the amount demanded, but the Collector omitting to do his statutory duty of entering satisfaction upon the certificate, the defaulter's property is sold, such sale is in *excess* of the Collector's *power* under the Act. (Mahomed Abdul *v.* Gujraj, I. L. R., 20 Calc., 826, P. C.)

Revenue sales in Bengal—when void.

Sec. 33 of Act XI of 1859 provides that the Civil Courts shall not annul a revenue-sale except upon the ground of its having been made contrary to the provisions of that Act, and then only under certain conditions. But where nothing was due from the plaintiff which could legally be recovered from him as an arrear of revenue, the sale of his property by the Collector was totally without jurisdiction, and could be set aside by the Civil Court, although there was no irregularity in publishing and conducting the sale, and no appeal to the Commissioner against it. (Byjinath *v.* Lalla, 10 W. R., F. B., 66). Such a sale is no legal sale, and is absolutely void. (Sreemunto *v.* Shama Soonderi, 12 W. R., 276, 311 ; Baboo Hur Gopal *v.* Ram Gopal, 13 W. R., 381). It has been held that sec. 33 of Act XI of 1859 does not also apply to a sale made on a day on which the Collector had no right to make it. If the day on which the sale is

notified to take place is less than 30 days from the time when the notice of it is affixed in the office, no adjournment of the sale to any subsequent day will legalize the proceedings. Such a sale, though professedly made under the Act, is not a sale under the Act. The Collector's non-compliance with the provisions of sec. 6 of the Act is not a mere irregularity, it renders the proceedings absolutely void. In such a case the owner of the estate or share sold may bring his suit even after the year allowed by this article, or by sec. 33 of Act XI of 1859. It is not necessary for the owner to obtain a decree setting aside a sale which is no sale at all. (Lalla Mobaruk *v.* Secretary of State, I. L. R., 11 Calc., 200, F. B.) But their Lordships of the Privy Council have recently pointed out that this distinction between cases of illegality and irregularity is not recognised by secs. 25 and 33 of Act XI of 1859, and that sales made in contravention of *any* of the provisions of that Act can be set aside by the Civil Court, only when the conditions required by sec. 33 are fulfilled. (Gobindlall *v.* Ramjanam, I. L. R., 21 Calc., 70, P. C. See also Venkata *v.* Chenyadu, I. L. R., 12 Mad., 108, and 2 Mad. Law Journal, p. 6). Recent P. C. ruling.

It has been held that non-compliance with the provisions of sec. 290 of the Civil Procedure Code will absolutely vitiate a sale in execution (Bukshi *v.* Malak, I. L. R., 7 All., 289 ; Sadhusaran *v.* Panchdeo, I. L. R., 14 Calc., 1, at p. 8), and that the same rule will apply where one thing is advertised for sale, and another is actually sold. In such a case, it is said, there is in fact no sale proclamation at all. (Ramdogan *v.* Bhawani, I. L. R., 14 Calc., 9). Similarly, it has been held that a sale which takes place before the hour advertised for sale is *no* sale under the Civil Procedure Code (Basharat *v.* Uma Churn, I. L. R., 16 Calc., 724). But all these cases proceed on the supposition that non-compliance with the full requirements of the Procedure laid down for publishing or conducting a sale is an *illegality* which vitiates the sale *ab initio*. Their Lordships of the Privy Council have recently held that even an infringement of an express prohibition, like that contained in sec. 290 of the Civil Procedure Code, has *not* the effect of making the sale null and void, and that a sale in contravention of such a provision may be summarily set aside under sec. 311 of the Civil Procedure Code only on direct proof of substantial injury resulting therefrom. (Tasadduk *v.* Ahmad, I. L. R., 21 Calc., 66, 69, P. C.) See the judgment of Brodhurst, J., in Ganga *v.* Jaglal, I. L. R., 11 All., 333. Void sales in execution. Recent P. C. ruling.

Sec. 312 of the Civil Procedure Code does not apply to sales in execution of a certificate issued under Beng. Act VII of 1880, and even if it did apply, it would not prevent the institution of a suit in respect of a sale which is null and void (Sadhusaran *v.* Panchdeo ; Ramlogan *v.* Bhawani, I. L. R., 14 Calc., 1 and 9). Sale under Certificate Act.

A suit brought for the purpose of *declaring* that a sale for arrears of rent is a nullity by reason of the tenure having been previously sold to the decree-holder himself for later arrears is not governed by this article. (Prangour *v.* Himanta, I. L. R., 12 Calc., 597). Cf. p. 667. Declaration of nullity.

In order that this article, or sec. 33 of Act XI of 1859, may apply, the revenue-sale must be a real sale for arrears, and not merely a device—part of the machinery, as it were—to effect a fraud. In such a case the sale may, as between the plaintiff and the parties to the fraud, be considered as a private sale. (Nawab Sidhee *v.* Ojoodhyaram, 5 W. R., P. C., 83, 88). The plaintiff suing for relief on the ground of such fraud may maintain a suit, if not to set aside the sale to have the property reconveyed to him. (See Bhoobun *v.* Ram *Fraud* in sales.

Soonder, I. L. R., 3 Calc., 300; Amiroonnissa *v.* The Secretary of State, I. L. R., 10 Calc., 63). Art. 95 may apply to a suit of this description. (See I. L. R., 3 Calc., 300; Nilakandan *v.* Thandamma, I. L. R., 9 Mad., 640). In some cases the twelve years' rule has been applied. (See Chunder Nath *v.* Tirthanund, I. L. R., 3 Calc., 504; and Uma Shanker *v.* Kalka, I. L. R., 6 All., 75). Where there is such a fraud, the period of limitation runs from the discovery of the fraud. The dictum in Raghubar *v.* Bhikyelal (I. L. R., 12 Calc., 69, at pp. 75 and 81), that, the three years' time runs from the confirmation of sale is not borne out by any article in this schedule. See Bajaji *v.* Pirchand, I. L. R., 13 Bom., 221.

Where *purchaser* has been defrauded.

An execution purchaser to whose case sec. 313, Civil Procedure Code, does not apply, has, it is true, no summary remedy under the Code. But if he has been induced by *fraud* to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived, he still has the right to have the sale set aside. (Birj Mohun *v.* Rai Umanath, I. L. R., 20 Calc., 8, at p. 11, P. C.)

J.—creditor defrauding j.—debtor.

Where the decree-holder after consenting to a postponement of an execution sale proceeds with the sale and purchases the property himself, he may be ordered to reconvey the property to the judgment-debtor. Gunga Persad *v.* Gopal, I. L. R., 11 Calc., 136, P. C. In a later case their Lordships of the Privy Council have held that a regular suit to set aside a sale even on the ground of the decree-holder's fraud is altogether barred by sec. 244 of the Civil Procedure Code. (See *infra*, I. L. R., 19 Calc., 683, P. C.)

Limitation in cases of fraud.

Where the decree and the proceedings resulting therefrom are vitiated by fraud, a suit to set aside the sale, it has been held, is governed by art. 95. (Natha *v.* Natha, I. L. R., 6 All., 406; Parekh *v.* Baivakhat, I. L. R., 11 Bom., 119). But cf. Chunder *v.* Tirtha, I. L. R., 3 Calc., 504; and I. L. R., 6 All., 75. In some cases the application of art. 12 in conjunction with sec. 18 will be sufficient to protect the plaintiff against a person who is guilty of the fraud. (See Ramdoyal *v.* Ajoodhya, I. L. R., 2 Calc., 1, 8).

Reg. suit by j.—debtor to set aside sale for fraud, barred by sec. 244, Civ. P. Code.

It has been held by the High Courts that where the decree-holder himself is the auction purchaser, a regular suit will not lie to set aside the sale even on the ground of a fraudulent suppression of notice of sale, &c. (See sec. 244, Civil Procedure Code; Viraraghana *v.* Vinkatacharyar, I. L. R., 5 Mad. 217; Mohendro *v.* Gopal, I. L. R., 17 Calc., 769, F. B.) Their Lordships of the Privy Council in a recent case point out that other Indian cases have put a *wider* construction on sec. 244 of the Civil Procedure Code, and adopting those cases they hold that the fact that a person *not a party* to the suit is the auction purchaser at an execution sale is no bar to the application of the section. (Prosunno *v.* Kalidas, I. L. R., 19 Calc., 683, P. C.)

Cls. (*b*), (*c*), (*d*).

Cl. (*b*).—The order mentioned in clause (*b*) means an order of the nature of a decree, or one made by the Revenue-officer in his judicial capacity (Sakharam *v.* The Collector, 8 Bom., F. B., 219). A sale of land by a non-judicial order of the Collector is not governed by the one year's limitation under this clause. (*Ibid.*) Administrative orders which in their nature are merely provisional and temporary need no setting aside. (Shivji *v.* Collector, I. L. R., 11 Bom., 429, 432).

Cl. (*c*).—For "demands recoverable as arrears of revenue," see Bengal Acts VII of 1868, VII of 1880 and sec. 5, Act XI of 1859.

Cl. (*d*).—A sale of a putni or other intermediate tenure for arrears (of rent), other than current arrears, is not governed by this clause See cls. 2 and 3, sec. 8, Reg. 8 of 1819 (Bengal).

In the event of an objection under sec. 311, Civil Procedure Code, an execution sale is confirmed when such objection is disallowed by the *first* Court under sec. 312. (Mahomed *v.* Purander, I. L. R., 11 Calc., 287). Sales, when final

As to when a revenue-sale becomes final and conclusive, see sec. 27, Act XI of 1859, as modified by secs. 2 and 4 of Act VII of 1868 (B. C.), and Raj Chandra *v.* Kinoo, I. L. R., 8 Calc., 329.

A *patni* sale under Beng. Reg. VIII of 1819 does *not* require to be *confirmed* by the Collector. Such a sale becomes final and conclusive when the whole of the purchase-money has been paid under sec. 9 of the Regulation, and the limitation of one year runs from the date of such payment. (Bhuban *v.* Girish, 2nd Appeal No. 405 of 1892, decided by Norris and Banerji, JJ., on the 22nd of June 1894).

As to when it is necessary to set aside a sale, see also the notes under arts. 13, 14 and 91.]

13.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year	... The date of the final decision or order in the case by a Court competent to determine it finally.

[No. 13. (No. 15, Act IX ; sec. 1, cl. 5, Act XIV). The reason for the one year's limitation in arts. 11, 12 and 13 is that a person who has once commenced to litigate should carry his litigation to an end within a reasonable time. (Perkas *v.* Bai Vaket, I. L. R., 11 Bom., 119, at p. 123 ; and I. L. R., 15 Calc., 521, P. C.) Period, why so short.

A regular suit is not maintainable to set aside, on the ground of irregularity in publishing or conducting a sale, an order confirming or setting aside the sale under sec. 312, Civil Procedure Code. See notes under art. 12. If the order be treated as an order in the course of a *suit*, art. 13 cannot apply to a suit to set aside such an order. (See I. L. R., 8 Mad., 82). Where the Court has no jurisdiction, its decision or order will bind no one, and it will not be necessary to sue to set it aside. (Wooma *v.* Ram Buksh, 16 W. R., 11, 13). Suit, not maintainable or necessary.

Where the simple question raised is whether the Civil Court's summary decision or order under any particular law was rightly given or made, and the suit is merely to set aside the decision or order, such suit, if maintainable, must be governed by this article. (See Loknarain *v.* Ranee Myna, 7 W. R., 199, F. B.) Suits governed by this article.

A suit, which is *virtually* and *substantially* a suit to set aside a summary decision or order (a decision or order in a miscellaneous proceeding), is also governed by this article, even if the plaint does not in terms seek to set aside such decision or order. The test is, whether the summary decision or order could be set up as a bar or impediment to the maintenance of the suit. If it could, then it must be said that the suit is brought in reality, though not in words to set aside the summary decision or order (Durgaram *v.* Nundocoomar, 1 Shome, 26, citing Loknarain's case in 7 W. R., 199, F. B. See also Babaji *v.* Anna, 10 Bom., 479). A suit for a *declaration* that an order under sec. 10, Act XX of 1863, by a District Judge appointing the defendant to be a member of a temple committee is "illegal and invalid and consequently null and void," *and* for an *injunction* restraining the defendant from performing any of the functions devolving on the temple committee is *virtually* a suit to set aside the order of the Test of necessity to set aside order. Suit for declaration *and* injunction.

District Judge to which art. 13 is applicable. (Subramania *v.* Minakshi, 3 Mad. Law Journal, 128). Orders to which by law is given a *particular effect* in favor of one person or against another, subject, in the regular course, to a further judicial proceeding, having for its object to quash them or set them aside, must be set aside in order that they may not have that effect. (Shivji *v.* Collector, I. L. R., 11 Bom., 429). Such orders must be set aside within the time allowed by the law applicable to the case. (If they are *not* "orders of a Civil Court in a proceeding other than a suit," they may be set aside within six years under art. 120. See, for an instance, Faki Gulam *v.* Sajnak, I. L. R., 18 Bom., 244, cited in the notes under art. 14). But where the law only provides that, *notwithstanding* the summary order, a suit may be brought to establish the right, it is not necessary to set aside the order. (*Ibid.*) Secs. 283, 332 and 335 of the Civil Procedure Code give instances of orders of the former kind, while sec. 9 of the Specific Relief Act, sec. 89 of the Bengal Land Registration Act, VII of 1876, and sec. 17 of Act XIX of 1841, give instances of orders of the latter kind. Suits in respect of orders referred to in secs. 283 and 335 of the Procedure Code are, however, governed by another special article, *viz.*, No. 11. But a suit to establish right after an adverse order under sec. 9 of the Specific Relief Act (see pp. 327, 328, *supra*) or Act XIX of 1841 (7 W. R., 199, F. B.) is not governed by any special rule of limitation, and may be brought within the ordinary period. So also a suit for possession or declaration of title, after an adverse order under the Bengal Land Registration Act, may be brought even after the one year prescribed by this article or art. 14 (Luchmon *v.* Kanchon, I. L. R., 10 Calc., 525). It has also been held, that an order under Act XXVII of 1860 is no bar to a suit upon title, though brought after the one year allowed by this article. (Kalee *v.* Srimati Kylasmoni, 8 W. R., 126; Bai Kashai *v.* Bai Jamna, I. L. R., 10 Bom., 449). In a suit to recover property which has been improperly sold by the guardian of an infant under an order of the Civil Court (under sec. 18, Act XL of 1858), it is not necessary to set aside such order. (Sikher *v.* Dulputty, I. L. R., 5 Calc., 363). An *order* of the District Court granting permission to a guardian to dispose of the immoveable property of the ward under the new Act VIII of 1890 is now declared to be *not liable* to be contested by suit or otherwise. (See sec. 48 of Act VIII of 1890). The *sale* itself may be impugned on the ground that it was made fraudulently and illegally against the interest of the ward. (I. L. R., 5 Calc., 363).

Two kinds of valid orders. One must, other need not, be *set aside.*

Orders of a 3rd kind *cannot* be set aside.

Suit for refund of money paid to defendant by order of Court. Sec. 295, Civ. P. Code.

It was suggested by Sir B. Peacock, C. J., and held by Norman, J., that a suit to recover money that has been erroneously paid away to a rival decree-holder under sec. 270 of Act VIII of 1859 should be treated as a suit to recover the money by setting aside the order of the Court in the execution department. (Gogaram *v.* Kartik, 9 W. R., 514; Wooma *v.* Rambuksh, 16 W. R., 11). But sec. 295 of Act XIV of 1882 expressly enacts that if the assets realized in execution be paid by the Court to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. As the order of the Court is no impediment to a regular suit for the refund (Sivaram *v.* Subramania, I. L. R., 9 Mad., 57, 61), it may be fairly argued that it is not necessary to set aside such orders. But in Gowri Prosad *v.* Ram Ratan, I. L. R., 13 Calc., 159, McDonell and Beverley, JJ., adopted the dicta in 9 W. R. and the ruling in 16 W. R., and held that art. 13 applied to such suits for a refund. The learned Judges, however, did not refer to Taponidi *v.* Mathura, I. L. R., 12 Calc., 499, where Wilson and Field, JJ., observed that such a suit is not a suit to set aside any order at all. It is brought to enforce a right which the law gives to the plaintiff, and which right

arises by virtue, among other things, of the order under sec. 295. And the existence of that order in full force is in no sense inconsistent with the right of the plaintiff to compel a refund. (See arts. 62 and 120). In Vishnu *v.* Achut, I. L. R., 15 Bom., 438, Birdwood and Parsons, JJ., referring to a regular suit after an adverse order under sec. 295 of the Civil Procedure Code, say: "It was clearly not necessary for the plaintiff to sue to set aside any order, inasmuch as sec. 295 of the Code expressly permits a suit of this kind. The order made under the section is, therefore, no bar to the suit, and a suit to set it aside is unnecessary." The learned Judges point out that art. 13 of Act XV is not applicable to such a suit for the further reason that an order under sec. 295 is *not* an order in a "proceeding *other* than a suit." (*Ibid.*, p. 440). Sec. 1, cl. 5, of Act XIV of 1859, applied to *all* summary decisions or orders of the Civil Court. Orders under sec. 295, Civ. Pro. Code.

As to orders under sec. 332, Act XIV of 1882, there is this difference that orders under that section (like those under sec. 283) are declared to be *final*, unless contested in a regular suit. It is probable that orders under sec. 332 of the Civil Procedure Code have been omitted from art. 11 by oversight. (Stokes' Anglo-Indian Codes, Vol. II, p. 978). Such orders might fall under art. 13. But it has been held that such an order being passed in the course of execution of a decree in a suit is an order in a *suit*, and, therefore, not governed by art. 13. (Ayyasami *v.* Samiya, I. L. R., 8 Mad., 82; Narasimma *v.* Appala Charlu, I. L. R., 12 Mad., 294, at p. 296; Vishnu *v.* Achut, I. L. R., 15 Bom., 438). It may be here observed that though art. 15 of Act IX of 1871 was exactly similar to art. 13 of this Act, it was held in Calcutta that art. 15 of the Act of 1871 applied to orders passed in the execution department. (See Dhuronidhur *v.* Agra Bank, I. L. R., 5 Calc., 86). Notwithstanding the definition of the word "suit" in sec. 3 in this Act, an order passed on an *application* under sec. 332 is treated as an order in a proceeding arising out of a *suit*. (See I. L. R., 8 Calc., 51, P. C., and sec. 4, Act VI of 1892). It may be added that if art. 13 does not apply to a suit to set aside an order, art. 14 or art. 120 may. (See pp. 661, 668, *supra*, and p. 670, *infra*). Orders under sec. 332. Orders in *execution* are orders in *suit*.

Where a Judge or a Collector does not entertain an application, or refuses to pass an order on the ground that he has no jurisdiction, this article cannot apply. (Mussamut Momudannessa *v.* Mahomed Ali, 1 W. R., 40; Kristodass *v.* Ramkant, I. L. R., 6 Calc., 142). An order passed without jurisdiction need not be set aside. (Debi Persad *v.* Jafar Ali, I. L. R., 3 All., 40; see also Wooma *v.* Ram Bux, 16 W. R., 11; Ram Kissen *v.* Bhowani, I. L. R., 1 All., 333, 336, F. B.) A suit to set aside a decree or order in a *suit* is not governed by this article (I. L. R., 8 Mad., 82). For suits to set aside decrees obtained by fraud, see art. 95. Decrees passed without jurisdiction by Courts of limited jurisdiction may be treated as void, and such decrees do not require to be set aside. (See Narohari *v.* Annapurnabae, I. L. R., 11 Bom., 160, 171). Orders without jurisdiction.

Where a Court having jurisdiction has passed an order against which the law allows no appeal, limitation will run from the date of such order and not from the date of the order passed on appeal. (Olumonissa *v.* Buldeo, 7 W. R., 151). Where no appeal allowed.

When an order cannot be set aside, because it was passed more than a year before the institution of the suit, it may, in some cases of manifest wrong, be rendered innocuous by issuing an injunction upon the opposite party (I. L. R., 5 Calc., 86, 96).] Remedy *after* one year.

14.—To set aside any act or order of an officer of	One year	...	The date of the act or order.

	Government in his official capacity, not herein otherwise expressly provided for.		

Art. 14 where applicable and where not.

[No. 14. (No. 16, Act IX). See notes to art. 13. An order of a Munsiff or a Judge, *not* falling under art. 13, may be an order of an officer of Government in his official capacity within the meaning of this article (see p. 669, *supra*). It has been held that the Civil Court has no power to set aside an order passed under the Beng. Land Registration Act VII of 1876. (Omrunnissa *v.* Dilwar, I. L. R., 10 Calc., 350). Besides, sec. 89 of that Act expressly allows a regular suit for possession of, or for a declaration of right to, immoveable property, *notwithstanding* any orders under the Act. Such a suit is, therefore, not governed by this article. (Luchmon *v.* Kanchun, I. L. R., 10 Calc., 525). When the suit is not merely or necessarily a suit to set aside an official act of the Collector, but one to recover immoveable property, this article does not apply. (Krishnamma *v.* Acharyya, I. L. R., 2 Mad., 306). Under Act XIV of 1859 a suit merely to set aside an official act was not expressly provided for, but was governed by the six years' limitation under sec. 1, cl. 16. (Kebal Ram *v.* The Government, 5 W. R., 47). When an order does not fall within the authority of an official who makes it, it is legally a nullity, and, therefore, need not be set aside. (Shivji *v.* Collector, I. L. R., 11 Bom., 429). The limitation provided in art. 14 only applies where it is *necessary* to set aside an order before relief can be obtained. If the order is clearly *ultra vires*, it is an absolute nullity which it is not necessary to sue to set aside. (Bejoychand *v.* Kristomohini, I. L. R., 21 Calc., 626, at p. 632; Shivaji *v.* Collector, I. L. R., 11 Bom., 429; Nagu *v.* Salu, I. L. R., 15 Bom., 424). The article does not apply to a mere *temporary* and *provisional administrative* order. (I. L. R., 11 Bom., 429). The article applies to acts or orders of a functionary to which by law is given a *particular effect* in favor of one person or against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside. A summary order which does not prevent a suit need not be set aside. In the case of administrative orders which are merely *provisional*, the further and *final* decree or order replaces and so puts an end to them. (Shivji *v.* Collector, I. L. R., 11 Bom., 429, at p. 432). The "order" must be an "order *between* the parties," before it could be necessary to set it aside. The *consequences* of even such an order need not be set aside. A survey officer *framing the register* under the Khoti Act, I of 1880 (Bombay) does not make any "order" between the parties. The "framing of the register" may be treated as an "act" of the survey officer. If such "act" may be amended by the Revenue authorities themselves in accordance with the decision of the Civil Court, it need not be set aside by suit in a Civil Court. A "decision" passed by the survey officer in determining disputes arising in "framing the register" falls neither under art. 13 nor under art. 14. Such a "decision" between the parties may be set aside by suit within six years under art. 120. (Faki Gulam *v.* Sajnak, I. L. R., 18 Bom., 244). Dispossession under an order (of the Collector), which need not be set aside, is like dispossession by a private individual. Art. 142 may apply to such a case. (I. L. R., 11 Bom., 429).]

Art. 120 or 142 may apply if arts. 13 and 14 do not.

Art. 15.	15.—Against Government to set aside any attachment, lease or transfer of immoveable property	One year	... When the attachment, lease or transfer is made.

by the Revenue authorities for arrears of Government revenue.			

[No. 15. (No. 17, Act IX; sec. 1, cl. 4, Act XIV). When a Ghatwal becomes a defaulter, it is in the power of Government to make over his tenure to another person on the condition of making good the arrear due; or to transfer it or to dispose of it in some other form (Sec. 5, Reg. XXIX of 1814). A suit to set aside such a transfer is governed by this article. (Chittro *v.* The Assistant Commissioner of the Sonthal Pergunnahs, 14 W. R., 203).

Under the North-Western Provinces Land Revenue Act, XIX of 1873, secs. 150 and 154, the defaulter's *patti* or *mahal* may be attached and taken under direct management. A share or *patti* of a *mahal* may also be transferred for a limited time to a solvent cosharer in the *mahal*, on condition of his paying the arrear due from the *patti* (Sec. 157).]

16.—Against Government to recover money paid under protest in satisfaction of a claim made by the Revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	One year	...	When the payment is made.	Art. 16.

[No. 16. (No. 18, Act IX; sec. 1, cl. 4, Act XIV). When proceedings are taken under Chap. V of the North-Western Provinces Land Revenue Act, the defaulter may pay the amount of arrears claimed, under protest, to the officer taking such proceedings, and upon such payment the proceedings (arrest, distress, attachment, &c.) shall be stayed, and such defaulter may sue the Government in the Civil Court for the amount so paid (Sec. 189, Act XIX of 1873). As to whether an unsuccessful appeal to the higher Revenue authorities against an order for the payment of revenue at a higher rate, and the subsequent payment of the alleged excess without any actual protest, make the payment a "payment under protest." See Kebalram *v.* The Government, 5 W. R., 47. If money has been paid under protest for several years, only one year's amount can be recovered under this clause (5 W. R., 47; Bhujang *v.* Collector, 11 Bom., 1).]

17.—Against Government for compensation for land acquired for public purposes.	One year	...	The date of determining the amount of the compensation.	Art. 17.

[No. 17. (No. 19, Act IX). The Collector on making an award is required by law to pay the amount of compensation awarded by him, or in certain cases to deposit it in Court. If he does not so pay, or deposit, the amount may be recovered with interest by suit against Government. This article does not evidently apply to suits against a person who may have received from Government the whole or any part of the compensation awarded under the now repealed Act X of 1870, or the new Act, I of 1894. (See sec. 40 of the Act of 1870; secs. 31-34 of Act I of 1894). It has been held that art. 120 applies to such a suit. (Nundlall *v.* Meer Aboo, I. L. R., 5 Calc., 597). But may not art. 62 apply to such a suit? See the notes to that article. In such a case time runs from the date

when the defendant first took the money from Government. (Azroal *v.* Lalla, 8 W. R., 23).

The Government is not considered as a depositary of the money till such time as it is made over to the owner of the land. (Hills *v.* Magistrate, 11 W. R., 1). The suit against Government must be brought within one year.]

Art. 18	18.—Like suit for compensation when the acquisition is not completed.	One year	... The date of the refusal to complete.

[No. 18. (No. 20, Act IX). When the Government declines to complete the acquisition, the Collector is bound to determine the amount of compensation due for the damage (if any) done to the land (by the clearing, digging or marking it out) and to pay such amount to the person injured. (See sec. 54, Act X of 1870, and sec. 48 of Act I of 1894). A suit to recover the land itself is governed by the 12 years' rule.]

Art. 19.	19.—For compensation for false imprisonment.	One year	... When the imprisonment ends.

[No. 19. (No. 21, Act IX). False imprisonment is a continuing wrong. This article expressly provides that limitation runs from the time when the imprisonment ends. See pp. 245, 246, *supra*. "False imprisonment" is an injury to personal liberty; it is the *unlawful* detention of the person, *i.e.*, without sufficient authority. The illegal execution of a lawful warrant or process may amount to false imprisonment. An action will lie for false imprisonment if it was under colour of a legal process which has been subsequently set aside for irregularity. (Fisher *v.* Pearse, I. L. R., 9 Bom., 1). There must be a total restraint for some period, however short, upon the liberty of another, without sufficient legal authority. (Bird *v.* Jones, 7 Q. B., 743). A partial restraint of locomotion in a particular direction is not *imprisonment*. The article applies to suits for compensation—not for removal of the injury.

A suit for compensation for wrongful *restraint*—not amounting to imprisonment, is not governed by this article. See art. 36.]

Art. 20.	20.—By executors, administrators or representatives under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and be sued for certain wrongs*).	One year	... The date of the death of the person wronged.

[No. 20. (No. 12, Act IX). This article applies to certain suits *by* executors, &c. No. 33 applies to similar suits *against* executors, &c. Act XII of 1855 enables executors, &c., to sue and be sued for *damages* for certain *torts* or wrongs which, according to the law in force in 1855, did not survive to, or against, such executors, &c. In order that Act XII of 1855 might apply, the tort or wrong must have been committed within one year before the death of the person wronged (referred to in art. 20), or before the death of the person committing the wrong (referred to in art. 33). A suit for the value of an elephant wrongly sold by a deceased person, or for recovery of money due by a deceased agent, against the representa-

tive of the deceased, is not governed by Act XII of 1855. (Sreemutty Chundermoni *v.* Santomoni, 1 W. R., 251; Najuf *v.* Patterson, 2 N. W. P., 103). Notwithstanding the maxim of *actio personalis*, a suit to recover *specific property* or the *proceeds* or *value* thereof (which had been appropriated by the deceased wrong-doer and which could have been recovered from him in his lifetime), may be brought *against* his executors or other representatives, under the common law, and *independently* of Act XII of 1855. Only suits for unliquidated *damages* as such, for a wrong or tort, are governed by that Act. (Haridas *v.* Ramdas, I. L. R., 13 Bom., 677; Pollock on Torts, 3rd Ed., pp. 65, 66). Act XII of 1855 does not apply to a suit brought originally against the wrong-doer *himself*, and only subsequently sought to be *continued* against his heir or representative. (I. L. R., 13 Bom., 677). A suit commenced against the wrong-doer himself for wrongful arrest, malicious prosecution or other *personal* injury must abate on his death under sec. 361 of the Civil Procedure Code. (*Ibid.*)

Suit for specific property or its value against executors.

A suit *by* executors, &c., of the person wronged, even under Act XII of 1855, lies only when such wrong has caused pecuniary loss to the estate of such person; but a suit *against* executors, &c., of a deceased wrong-doer lies under Act XII of 1855, though no pecuniary loss was occasioned by it to the person wronged, if he *himself* brings the suit. (Gokul Chunder *v.* Musst. Burreck, 2 Hay, 325; Marshall, 344).

Pecuniary loss to estate of plaintiff-executor.

A remedy for a wrongful act, however, can, at *common law*, be pursued against the estate of a deceased wrong-doer, only when *his* estate has benefited by the wrongful act. In the absence of statutory provisions (like those of Act XII) or where such provisions are inapplicable, the common law maxim still prevails unless the *estate* is affected by the tort. (See the English authorities referred to by Parsons, J., at p. 680 of I. L. R., 13 Bom.)

Common law rule.

Causes of action for defamation, assault or other personal injuries not causing the death of the party do not survive to, and against, executors or administrators. Personal injuries by A to B, causing the death of B, entitle the executors, administrators or representatives of B (the person killed) to sue A for compensation under Act XIII of 1855, and art. 21. A cause of action to sue for restitution of conjugal rights or for a divorce does not also survive to executors or administrators. (See sec. 268, Act X of 1865, and sec. 89, Act V of 1881). It was a maxim of the English common law that a personal action for tort did not survive on the *death*, either of the person who did, or of the person who sustained, the wrong even if commenced in his lifetime (I. L. R., 13 Bom., 677, 680; and Pollock, 3rd Ed., 55). This maxim—*actio personalis moritur cum personâ*—has been modified by statute in so many instances that it is now said that the maxim is "more than falsified by particular exceptions." (See Pollock on Torts, 3rd Ed., 534). Causes of action on a *contract* are as much "personal" as those on a tort, but with the exception of promises of marriage, the maxim does not apply to these. (*Ibid.*, p. 55). Besides, sec. 37 of the Contract Act, IX of 1872, expressly enacts that, as a rule, promises bind the representatives of the promisors.]

Causes of action which do not survive.

Maxim *actio personalis* modified.

21.—By executors, administrators or representatives under Act No. XIII of 1855 (*to provide compensation to families for loss occasioned*	One year	... The date of the death of the person killed.	Art. 21.

by the death of a person caused by actionable wrong).

[No. 21. (No. 13, Act IX). No action or suit was formerly maintainable against a person who, by his wrongful act, neglect or default, caused the death of another person. Act XIII of 1855 renders the wrong-doer answerable in damages for the injury so caused by him. Previously to Act XIII of 1855 (which is founded on Lord Campbell's Act, 9 and 10 Vict., c. 92) the maxim *actio personalis moritur cum personâ*, strictly applied, and the right of action was held to die with the person. The action, now allowed, is for the benefit of the wife, husband, parent and child of the deceased, and not for the benefit of his estate *as such*. (Pollock, 3rd Ed., 58. See Lyall *v.* Gunga, I. L. R., 1 All., 60, F. B. ; Venayak *v.* The G. I. P. R., 7 Bom., 113).]

Art. 22.	22.—For compensation for any other injury to the person.	One year	... When the injury is committed.

[No. 22. (No. 22, Act IX ; sec. 1, cl. 2, Act XIV). Certain injuries to personal liberty, and injuries to reputation, and to life, are separately provided for. This article relates to immediate or consequential injuries affecting a man's limbs or body or health. Injuries caused by the unskilfulness of a physician or surgeon may come under this article read with sec. 24. (Collett on Torts, secs. 18 and 21 ; and p. 635, *supra*). Where the negligence of a professional man may be treated as a breach of his implied *contract* to use reasonable skill and care, art. 115 may apply to a suit for compensation against him. (See Underhill, p. 55, and notes under art. 115, *infra*).

Injury to the person committed by some animal belonging to, or by a servant of, the defendant comes under this article.]

Art. 23.	23.—For compensation for a malicious prosecution.	One year	... When the plaintiff is acquitted, or the prosecution is otherwise terminated.

[No. 23. (No. 23, Act IX). The prosecution must terminate in favour of the plaintiff (Bhyrub *v.* Mohendro, 13 W. R., 118), as in an acquittal, a discharge, or a withdrawal of the charge. If plaintiff had to prefer an *appeal* against his conviction by the first Court, the date of acquittal by the Appellate Court is the date from which limitation runs. (Hari Mohan *v.* Naimuddin, I. L. R., 20 Calc., 41). A malicious and illegal arrest in a *civil* case does not fall under this article. Art. 19 may apply to such a case.

Where there has been no prosecution, and the complaint made is the only act done, the date of the complaint is that of the wrong and the suit falls under art. 36. (Muduirapa *v.* Fakirapa, I. L. R., 7 Bom., 427, 430 ; see also Huree *v.* Ojoodhya, 10 W. R., 308). Malicious prosecution is a continuing wrong. See pp. 245, 246, *supra*.]

Art. 24.	24.—For compensation for libel.	One year	... When the libel is published.

[No. 24. (No. 24, Act IX ; sec. 1, cl. 2, Act XIV). Limitation runs from the time when the libel is published, not when the plaintiff becomes aware of it. (Robert and Charriol *v.* Lombard, 1 Ind. Jur., N. S., 192). The words "when the libel is published" do not mean,

"when the libel is first published." The plaintiff may compute the period of limitation from any publication of the libel. Every publication gives a fresh starting point of limitation. Proof of the sale or delivery of one copy of the libel within one year of the suit will negative the plea of limitation. (Duke of Brunswick *v.* Harmer, 14 Q. B., 185, cited in Darby and Bosanquet, p. 29). The recovery of damages against one journal is no bar to a suit against another for a repetition of the libel. (*In re* Howard, I. L. R., 12 Bom., 167, 169). The mere printing of a libel is not necessarily publishing it. (Starling; Watts *v.* Fraser, 7 A. and E., 223). There is no publication if the libel be addressed to the party himself, but giving a letter to be copied is publication. (Starling, 104; Komul *v.* Nobin, 10 W. R., 184; Hockford *v.* Galastin, 2 Hyde, 274).

A libel is some writing, picture or the like, containing defamatory matter.]

25.—For compensation for slander.	One year	...	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.	Art. 25

[No. 25. (No. 25, Act IX; sec. 1, cl. 2, Act XIV). This probably includes "slander of title."

To call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or to say of a Magistrate that he is partial and corrupt, is sufficient, even under English law, to give a cause of action without special damage. Impeaching a man of some punishable crime, or charging him with having a disease tending to exclude him from society, is also actionable *per se.* (See Stephen's Commentaries, Vol. III). It has been held that the rule of English law that slanderous words are generally not actionable in themselves should not be adopted by the Courts in British India. (See Parvathi *v.* Mannar, I. L. R., 8 Mad., 175, and notes to sec. 24). The latter portion of the provisions in the 3rd column of this article may perhaps apply to suits on the *original* side of the High Courts in the Presidency-towns.

If the words are not actionable in themselves (according to English law), time runs from the date when the special damage complained of results. The plaintiff may (according to English law) bring a second action for subsequent damage. (Lamb *v.* Walker, 3 Q. B. D., 389, 395, has been overruled. See notes to sec. 24, and Darby *v.* Mitchell, 11 App. Cas., 127, at p. 145). This is not a case of a continuing wrong under sec. 23. Supposing English law is applicable, the case provided for by the latter portion of this article comes under sec. 24. (See pp. 225, 226, *supra*).]

26.—For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year	...	When the loss occurs.	Art. 26

[No. 26. (No. 27, Act IX). Seduction includes (1) procuring to depart from service, (2) harbouring one who has wrongfully quitted

service, and (3) debauching a servant or daughter. (Underhill on Torts, p. 185). The first case *may* also fall under art. 27. The English theory on which the remedy for such a wrong as that of seduction of a young woman is based is a theory which has no place in the law of this country. The action is founded upon the loss of service of the daughter (whether married or not), in which service the parent is supposed by a fiction to have a legal right or interest. (Ram Lal *v.* Tula Ram, I. L. R., 4 All., 97). The action is in substance brought to repair the outrage done to parental feeling. (Stephen's Commentaries, Vol. III). A master standing in *loco parentis* may, according to English law, maintain a similar action for debauching his servant. (*Ibid.*) Where the daughter is a minor living with her father, service will be presumed. (Underhill, p. 186).

A suit for compensation for the abduction or seduction of, or adultery with, the plaintiff's *wife* does not come under this article. See art. 36.]

Art. 27.	27.—For compensation for inducing a person to break a contract with the plaintiff.	One year	...	The date of the breach.

[No. 27. (No. 28, Act IX). The inveigling or hiring the plaintiff's servant which induces a breach of contract comes under this article. Inducing ryots under contract with the plaintiff to cultivate indigo, to break that contract falls under this article. Under Act XIV of 1859 the six years' rule applied to such cases. (Meer Mahomed *v.* Forbes, 8 W. R., 257).]

Art. 28.	28.—For compensation for an illegal, irregular or excessive distress.	One year	...	The date of the distress.

[No. 28. (No. 29, Act IX). Distress is a taking, *without* legal process, of a personal chattel, for the redressing an injury, the performance of a duty, or the satisfaction of a demand. Distresses may be made on cattle damage-feasant, and also for rents, rates, taxes, &c.—Wharton. For seizure under legal process, see art. 29.

The distraint of crops for rents, and suits in respect of such distraint in Bengal were specially provided for in Act VIII of 1869, B. C. (See secs. 68-101). For the present Bengal law, see secs. 121-144, Act VIII of 1885. A suit for compensation for wrongful distraint under sec. 140 of Act VIII of 1885, comes under art. 36. This article does not govern suits for the redelivery (replevin) of goods taken unlawfully in distress.]

Art. 29.	29.—For compensation for wrongful seizure of moveable property under legal process.	One year	...	The date of the seizure.

[No. 29. (No. 30, Act IX). Limitation commences to run from the date of the wrongful seizure of moveable property, and not from the date of the release from attachment, &c. (Ram Singh *v.* Bhottro, 24 W. R., 298). Cf. art. 42. The wrongful seizure is not a continuing wrong. See p. 226, *supra*. Drawing out money from Court under the terms of a subsisting decree is *not* "*wrongful* seizure of property" even though the decree is afterwards set aside. (Narayan *v.* Narayan, I. L. R., 13 Mad., 437).

Standing crops are not moveable property. It has been held that money is "moveable property," and that a suit to recover a money allowance, wrongly taken in execution of a decree against a third person, with or without damages in the shape of interest, is a suit for compensation within the meaning of this article. (Jagjivan *v.* Gulam, I. L. R., 8 Bom., 17). But an order for payment of money to a party out of a fund in Court is not "a legal process under which wrongful seizure" takes place. (Rupabai *v.* Audimulam, I. L. R., 11 Mad., 345, 355). For a case of seizure of goods on a complaint of theft, see notes to art. 36. It has been held in the Central Provinces that a suit for compensation against a decree-holder for the wrongful attachment of plaintiff's cattle is barred by art. 29, even if plaintiff preferred a claim and such claim was rejected under sec. 283 of the Civil Procedure Code, and the cattle sold within the time allowed by art. 11. (Tejoo *v.* Mahavedale, 7 Central Prov. L. Rep., p. 77). Art. 29 is not affected by arts. 11 and 12. See p. 661. When injury is caused by an injunction wrongfully obtained, art. 42 applies.]

Part V.—Two years.

30.—Against a carrier for compensation for losing or injuring goods.	Two years	...	When the loss or injury occurs.	Arts. 30 and 31.
31.—Against a carrier for compensation for delay in delivering goods.	Ditto	...	When the goods ought to be delivered.	

[Nos. 30 and 31. (Nos. 36 and 37, Act IX). These articles apply to private carriers as well as to common carriers, whether by land or by water. It has been held that where the liability of the carrier arises out of a *contract* respecting the delivery of goods, a suit for compensation against him is governed by art. 115, and that these articles apply where there is no such contract, and loss or injury to goods arises from a tort, *e.g.*, from alleged negligence or want of proper care on the part of the carrier. (The B. I. S. N. Co. *v.* Hajee Mahomed, I. L. R., 3 Mad., 107; Kalu Ram *v.* The M. R. Co., I. L. R., 3 Mad., 240). When the plaintiff sues as for a breach of contract in respect of the delivery of goods and proves his case, art. 115 or art. 116, as the case may be, applies, although the defendants prove that they are guilty of a tort to which art. 30 or art. 31 may apply. (Danmull *v.* B. I. S. N. Co., I. L. R., 12 Calc., 477). See also Raisett *v.* G. I. P. Ry. Co., I. L. R., 17 Bom., 723. Non-delivery of goods is not necessarily loss of goods. (I. L. R., 12 Calc., 477). See note 1, p. 228, *supra*.

To a suit against a common carrier, such as a Railway Company, by the consignee of goods (not sent on sample or for approval) for compensation for non-delivery, art. 115, not art. 30, applies, inasmuch as the consignor contracts with the Company as agent for the consignee, and the property in the goods passes to the consignee on delivery to the Company. (Hassaj *v.* E. I. R. Co., I. L. R., 5 Mad., 388).

From the mere fact of non-delivery of the goods on a certain date, it cannot be inferred that the loss of the goods occurred on that date. If the carrier claims the benefit of this article, he ought to prove the date of the loss, supposing the plaintiff has given *primâ facie* evidence that his suit is not barred by limitation. (Mohun Sing *v.* H. Conder, I. L. R., 7 Bom., 478).]

Art. 32.	32.—Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years ...	When the perversion first becomes known to the person injured thereby.

First knows or learns.

[No. 32. (No. 38, Act IX). The words "first becomes known" occur in this article, in sec. 18 and in art. 114; the words "first learns," in art. 48; and the words "becomes known," in arts. 90, 91, 92, 95 and 96. See pp. 230 and 231, *supra*.

This article also applies to actions of tort only, and not to suits in respect of perversion, when such perversion amounts to a breach of a covenant subject to which a tenant holds the demised premises. (Kedar Nath *v.* Khetter Paul, I. L. R., 6 Calc., 34; Gunesh *v.* Gondour, I. L. R., 9 Calc., 147). But the Allahabad High Court have held that this article applies to a land-holder's suit for the removal of trees planted by his occupancy tenant. (Gangadhur *v.* Zahuree, I. L. R., 8 All., 446). If the defendant is a mere trespasser, art. 120 will apply to such a suit. (Musharat *v.* Iftkhar, I. L. R., 10 All., 634).

Wrongful conversion.

Does this article apply to a suit for wrongful conversion of goods by a bailee? (See Wilkinson *v.* Verity, L. R., 6 C. P., 206; Shephard, 38). Dr. Stokes suggests that such suits should be specially provided for. (Anglo-Indian Codes, Vol. II, p. 950). See arts. 48, 49 and 120.

Converting arable land into a grove or wood may amount to perversion. Art. 48 provides for the recovery of specific goods acquired by dishonest conversion.]

Art. 33.	33.—Under Act No. XII of 1855 (*to enable executors, administrators or representatives to sue and to be sued for certain wrongs*) against an executor, administrator or other representative.	Two years ...	When the wrong complained of is done.

[No. 33. (No. 39, Act IX). See notes under arts. 20 and 21. The suit under art. 33 is a suit brought *against* the executor or administrator or heir or representative of the deceased wrong-doer. The wrong must have been committed by the deceased within a year before his death, and be sued upon within two years of its commission.]

Arts. 34 and 35.	34.—For the recovery of a wife.	Two years ...	When possession is demanded and refused.
	35.—For the restitution of conjugal rights.	Ditto ...	When restitution is demanded and is refused by the husband or wife, being of full age and sound mind.

[Nos. 34 and 35. (Nos. 41 and 42, Act IX). When a third person detains the wife, a suit for recovery of the wife lies against such person. A suit for the recovery of a husband is not provided for. The husband, as well as the wife, may sue for the restitution of con-

jugal rights. A decree in a suit for restitution of conjugal rights is executed under sec. 260 of the Civil Procedure Code. A decree in a suit for the recovery of a wife is executed under sec. 259 of the Code. It has been held by a Full Bench of the Punjab Chief Court and by a Division Bench of the Bombay High Court that, so long as the relation of husband and wife subsists, a suit against the wife for the restitution of conjugal rights is not absolutely barred by limitation (*vide* notes under sec. 23), and that a suit for the recovery of a wife may be brought within two years of *any* demand and refusal. (See Rivaz, 3rd Ed., p. 134. See also Bai Sari *v.* Sankla, I. L. R., 16 Bom., 714). Limitation runs from date of "demand and refusal," not from date of "the first demand and refusal." Time does not run from the refusal of a minor or insane wife. The refusal from which limitation runs must be an absolute refusal. Arts. 34 and 35 leave the personal laws of Hindus, Mahomedans and others undisturbed. Where the personal law of the parties does not require antecedent demand, nor deprives minors and persons of unsound mind of the conjugal rights of co-habitation, neither art. 35 nor art. 34 has any application. The limitation applicable to a Hindu's or a Mahomedan's suit for restitution of conjugal rights is that of art. 120 of the second schedule read with sec. 23 of the Limitation Act. (Binda *v.* Kaunsilia, I. L. R., 13 All., 126). Suits for restitution of conjugal rights under the Indian Divorce Act are not governed by this article. (See sec. 1, and the notes under it). Even a suit for the *institution* of conjugal rights, before the consummation of the marriage, is, in *some* respects, treated as a suit for the *restitution* of conjugal rights. (See Dadaji *v.* Rukmabai, I. L. R., 10 Bom., 301).]

Sec. 23 applied to these suits.

Hindu or Mahomedan's suit governed by art. 120.

Institution of conjugal rights.

36.—For compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for.	Two years	When the malfeasance, misfeasance or nonfeasance takes place.	Art. 36.

[No. 36. (No. 40, Act IX). Suits for compensation for torts not specially provided for in this schedule are governed by this general article. Torts to the person or reputation as well as some other torts of a *quasi* personal character are governed by the one year's rule. (See arts. 19-27). Most instances of torts to moveable and immoveable property are governed by the three years' rule. See arts. 37, 42, 48 and 49. Causing injury to plaintiff's carriage or ship, such carriage or ship not being in the possession of the defendant, is governed by this general article. (Essoo *v.* The S. S. "Sabitri," I. L. R., 11 Bom., 133 and 136).

General article and *other* articles for torts.

Nos. 65, 115 and 116 are the general articles for suits for compensation for breaches of contracts; No. 49 is the general article for suits for specific moveable property; No. 80 for suits on bills, notes and bonds; No. 144 for the possession of immoveable property; and No. 120 for all other suits. No. 149 applies to all suits by Government. For an explanation of the terms malfeasance, misfeasance and nonfeasance, see the notes under sec. 23.

General articles in Sched. II.

Where on a complaint of theft of grain against the plaintiff, the Magistrate, of his own motion, attached the grain and referred the parties to a suit in the Civil Court to establish their right, and the complainant's suit was dismissed by the Civil Court, and the grain restored to the plaintiff in a damaged state, it was held that plaintiff's suit for damages for wrongful detention of his grain was at best governed by art. 36, and that limitation commenced to run, at the

Detention of grain.

latest, from the date of attachment (Mudvirapa *v.* Fakirapa, I. L. R., 7 Bom., 427). Cf. arts. 23 and 29.

Carrying away standing crops.

A suit for the value of standing crops carried away by the landlord, on the strength of an ejectment-decree subsequently reversed, has been held to be a suit for mesne profits under the latter part of art. 109 (Shurnomoyee *v.* Patarri, I. L. R., 4 Calc., 625). An ordinary suit for compensation for wrongfully carrying away standing crops has been held to be governed by art. 36. (Panadh *v.* Jennudi, I. L. R., 4 Calc., 665). Mr. Justice Field, however, in an unreported case, held, that as such carrying away is preceded by a *trespass* on immoveable property, it may be treated as matter in aggravation of the trespass, and as such governed by art. 39. Whatever injury a trespasser causes to the property while he is trespassing, or which results immediately from his acts, is matter in aggravation of the trespass, and as such is proper for the consideration of the Court when estimating the damages to be awarded for the trespass. (Phear on Rights of Water, p. 100. See also Form of Suit for Trespass, Sched. IV, Act XIV of 1882 ; and Narasimma *v.* Ragupathi, I. L. R., 6 Mad., 176). As to the time when the cause of action for a tort generally arises, see p. 225, *supra*.

Suing in contract or in tort.

As to when a plaintiff has the option of suing either in contract or in tort, see notes to arts. 30, 31, 115, and p. 229 (note), *supra*. There are cases in which the plaintiff is at liberty to waive a tort committed by the defendant, and sue in assumpsit for money recovered as the result of the tort. (Govinda *r.* Bapu, 5 Mad., 200 ; Pachayappean *v.* Narayana, I. L. R., 11 Mad., 269, 271). The liability of a judgment-creditor to the auction-purchaser for a wrong description in the sale proclamation arises out of a contract, and is not governed by this article. (Mahomed *v.* Novraji, I. L. R., 10 Bom., 214).

Misdescription in sale proclamation.

Torts governed by this article.

Suits for damages for loss of ship by collision (Essoo *v.* Sabitri, I. L. R., 11 Bom., 133), suits for compensation for obstructing easements other than those mentioned in arts. 37 and 38, for polluting water, for carrying on a noxious trade, for abduction, adultery, &c., &c., are governed by this article. Suits for the *abatement* of a nuisance or for an *injunction* are not provided for by art. 36.]

Part VI.—Three years.

Arts. 37 and 38.	37.—For compensation for obstructing a way or a watercourse.	Three years ...	The date of the obstruction.
	38.—For compensation for diverting a watercourse.	Ditto ...	The date of the diversion.

[Nos. 37 and 38. (Nos. 31 and 32, Act IX). Suits for *injunctions* for the removal of obstructions, &c., are not governed by these articles.

Where the obstructions are in the nature of continuing nuisances, the cause of action is renewed *de die in diem* so long as the obstruction is allowed to continue. (See sec. 23, and Rajrup Koer *r.* Abul Hossein, I. L. R., 6 Calc., 394, 404). If there was in this respect any distinction under Act XIV of 1859 as to suits for removal of continuing obstructions, and suits for damages for such obstructions (see Ponnusawmi *v.* Collector, 5 Mad., 6, 24 ; and Sri Viswambara *v.* Sri Sri Saradhi, 3 Mad., 111, 113), such distinction does not exist under the present law. Sec. 23 applies to both classes of suits. Even as regards a claim for damages only, a continuing obstruction gives rise to a fresh cause of action as fresh damage results from it. See notes under sec. 23.

Obstructions and disturbances of other easements,—*e.g.*, of the right to light or air,—are not specially provided for. Art. 36 will apply to suits for compensation in such cases. An obstruction to the migration of fish to and fro in plaintiff's *julkur* is not an obstruction to a watercourse. (See Moharanee Surnomoyee *v.* Degumbary, 2 Shome, 93). Independently of any question of limitation properly so called, no right to an easement can be established under sec. 26, if its enjoyment was interrupted two years before the institution of the suit. If the plaintiff cannot establish an immemorial right, or a right created by grant, &c., he must sue within two years of the interruption. See pp. 413, 415, 416, 437 and 639, *supra*.]

39.—For compensation for trespass upon immoveable property.	Three years	...	The date of the trespass.

Art. 39.

[No. 39. (No. 43, Act IX). See the notes under art. 36.

A trespass upon land is committed by entry on the same without lawful authority, and is in English law called trespass *quare clausum fregit* as distinguished from trespass to another's goods or person. A forcible entry by the *owner* having a present right to possession is not an actionable trespass. (See Newton *v.* Harland, and Harvey *v.* Brydges, referred to at p. 23, 6 W. R., Civ. Ref., 21. See also Low *v.* Telford, 1 App. Cas., 414, 426, and p. 116, note, *supra*). A man is answerable not only for his own trespass, but for that of his cattle also. (Stephen's Commentaries, Vol. III). An act committed beyond the bounds of the property affected by it may be a nuisance, but is not a trespass. (Phear, 101). The trespass continues so long as the unlawful entry lasts. (Narasimma *v.* Ragupathi, I. L. R., 6 Mad., 176, 178). Unless and until "possession" has been acquired by the trespasser, the very continuance of the state of things which constitutes the trespass is a new trespass at every moment. (Holmes *v.* Wilson, 10 Ad. and El., 503; Pollock on Torts, 3rd Ed., p. 339). Suits to *recover* immoveable property from a trespasser are governed by art. 142. (Jaharmal *v.* Municipality, I. L. R., 6 Bom., 580). In order to maintain an action of trespass, the plaintiff must be in possession of the land. *Trespass* and other violations of *possessory* rights can be committed not only against the person who is lawfully in possession, but against any person who has legal *possession*, whether rightful in its origin or not, so long as the trespasser or other intruder cannot justify the act under a better title. (Pollock on Torts, 3rd Ed., p. 322). When the plaintiff alleges *ouster*, and sues the trespasser in *ejectment*, he cannot succeed unless he shows such a *title* to the property in dispute as entitles him to immediate possession. (Kalee *v.* Adoo, 9 W. R., 602).

Trespass and nuisance.

The grantor of an easement, or a highway, may maintain an action for trespass on the land over which the highway or the easement exists. (Underhill on Torts, 195; 26 L. J. Ex., 345). A suit for a declaration of an exclusive right of entry in a temple, and for an injunction restraining the defendants from trespassing into the temple, is not barred by this or any other article, simply because the first act of trespass was committed several years ago. (Anandrav *v.* Shankar, I. L. R., 7 Bom., 323).

Fishing in plaintiff's tank or lake without his permission is an act of trespass only, when the plaintiff himself is not prevented from fishing there. (Lakhimoni *v.* Koruna, 3 C. L. R., 509). But the acts of the defendant in taking fish from the plaintiff's *julkur* cannot be considered as successive acts of trespass, if they appear to have

Trespass and dispossession.

been exercised continuously under a claim of right. They must be considered as a dispossession by the defendant of the plaintiff's right *pro tanto*. (Parbutty *v.* Mudho, I. L. R., 3 Calc., 276). These cases were decided under Act IX of 1871.

A trespass, when it amounts to an ouster of the possessor of the property, cannot be treated as a "continuing wrong" under sec. 23. See p. 116, *supra*.

Trespass on moveables (see Form No. 73, Sched. IV, Act XIV of 1882) does not come under this article. Arts. 28, 29, 36, 48 or 49 may apply to such trespasses.]

Art. 40.	40.—For compensation for infringing copyright or any other exclusive privilege.	Three years ...	The date of the infringement.

[No. 40. (No. 11, Act IX ; sec. 1, cl. 2, Act XIV). A "patent right" in respect of a new manufacture is an exclusive privilege like "copyright." Act V of 1888, the Inventions and Designs Act, deals with the subject. Act XX of 1847 is the Indian Copyright Act. An exclusive right of ferry is also an exclusive privilege, but not of a like nature with "copyright." A suit in respect of a right of ferry is therefore not governed by this article. (*Noscitur a sociis*. See p. 177, *supra*). The right of a particular class of persons or of the public is not a privilege.

Noscitur a sociis.

It has been held that the taking of an account of profits obtained by the defendant is only a mode of compensating an inventor for the infringement of his privilege, and that a suit for such an account is governed by this article. (Kinmond *v.* Jackson, I. L. R., 3 Calc., 17). Dr. Stokes suggests that art. 40 should be expressly extended to suits for an account of the profits obtained by infringing a copyright or patent right. (Anglo-Indian Codes, Vol. II, p. 950).

A suit for an *injunction* to restrain a piracy of copyright by sale of a book published more than a year before suit is not barred by art. 40, nor by sec. 26 of 5 and 6 Vict., c. 45. (See MacMillan *v.* Suresh, I. L. R., 17 Calc., 951).

Trade-marks. Rights to trade-marks and trade-names are also exclusive rights. (Leather Cloth Co., Limited *v.* American Leather Cloth Co., Limited, 11 House of Lord's cases, 533, 538). Such rights are in a certain sense property. (See p. 327, note, *supra*). Infringements of trade-marks and trade-names are probably governed by this article.]

Art. 41.	41.—To restrain waste	Three years ...	When the waste begins.

[No. 41. Suits for compensation for waste are governed by the general provisions of art. 36. For form of suit, see No. 83, Sched. IV, Act XIV of 1882. Illustrations (*m*) and (*n*) under sec. 54 of Act I of 1877 give instances of suits for injunctions to restrain waste by Hindu widows and undivided coparceners. For form of suit, see No. 100, Sched. IV, Act XIV of 1882.

Waste is any considerable spoil or destruction in houses, woods, gardens, trees, lands, &c., by a lessee, a life-tenant, a mortgagor or mortgagee in possession, a cosharer, &c. (Stephen, Vol. III ; Wharton). The conversion of arable lands into *bhiti* lands and *vice versâ* may amount to waste or perversion.

According to the English law waste is an injury to real property. For an instance of waste of personal property, see Hurry *v.* Apoorna, 6 Moore's I. A., 433.

Time begins to run when the waste begins, not when it ceases.]

42.—For compensation for injury caused by an injunction wrongfully obtained.	Three years ...	When the injunction ceases.	Art. 42.

[No. 42. (No. 86, Act IX). An award of damages under sec. 497, Act XIV of 1882, for an *ad interim* injunction wrongfully obtained, bars any suit for compensation in respect of the issue of such injunction.

When the attachment of moveable property released under sec. 280, Civil Procedure Code, is maintained by an injunction issued in a suit under sec. 283, and such suit is ultimately dismissed, a suit to recover damages for injury to the property while under attachment, is governed by this article. (Punjab Record, Rivaz, 137).]

43.—Under the Indian Succession Act, 1865, section 320 or 321, *or under the Probate and Administration Act*, 1881, *section* 139 *or* 140,* to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years ...	The date of the payment or distribution.	Art. 43.

[No. 43. A creditor or other claimant against the estate of a deceased person may follow the assets or any part of them in the hands of the persons who may have received the same from the executor or administrator. Where the creditor is a mortgagee, and the (legal) mortgage debt is still unbarred, his claim against the residuary legatee, under this article, is in the nature of an *equitable* demand and not being governed by the English Statute, *may* in England be dismissed on the ground of *laches* or passive acquiescence. (Blake *v.* Gale, 31 Ch. D., 196).

A suit against an executor or administrator *personally*, founded on a *devastavit* in distributing the assets or otherwise, is not governed by this article. In England such a suit is governed by the six years' rule. (Gale Blake *v.* Blake, 22 Ch. D., 820). An executor in England, unless he is protectd by the Trustee Act of 1888, may be made liable even after the expiration of that period, on the ground of breach of trust in an action to administer his testator's estate. (*Re* Marsden, 26 Ch. D., 783; Lewin on Trusts, 9th Ed., p. 396). See arts. 36 and 120.]

44.—By a ward who has attained majority to set aside a sale by his guardian.	Three years ...	When the ward attains majority.	Art. 44.

[No. 44. There was no corresponding article in Act IX.

A "sale" does not include a mortgage or lease, but art. 91, read with sec. 7, will apply to suits to set aside *instruments* of mortgage or lease, executed by the guardian of a ward. (See Ramausar *v.* Raghubar, I. L. R., 5 All., 490). See also Seetaram *v.* Nilu, 1 Cent. Prov. L. Rep., Sale, *not* mortgage or lease.

* *Vide* Act V of 1881, sec. 156.

75). Dr. Stokes suggests that this article should be extended to mortgages and leases. Anglo-Indian Codes, Vol. II, p. 950.

Sale, void or voidable.

Where the sale is *ab initio* void, as where a guardian or manager appointed under Act XL of 1858 sells his ward's immoveable property without an order of the District Judge previously obtained, it is not necessary to set aside the sale. A suit for recovery of the property against the purchaser in such a case of sale will be governed by the twelve years' rule of limitation. An unsanctioned Act of a certificated guardian in excess of the powers conferred by sec. 18 of Act XL of 1858 is *void*. (Mahomed *v.* Saraswati, I. L. R., 18 Calc., 259, at p. 262). But it has been held by the Allahabad High Court that an alienation by a certificated guardian without the sanction of the District Court under sec. 18 of Act XL of 1858 is not illegal or void *ab initio* (Girraj *v.* Kari Hamid, I. L. R., 9 All., 340). And sec. 30 of Act VIII of 1890 expressly provides that such alienations by a guardian appointed or declared by the Court shall be *voidable* at the instance of any other person affected thereby. Voidable sales must, of course, be set aside by the ward within the three years allowed by art. 44. Where the necessity of impugning a sale, made by a guardian of the plaintiff, of his equity of redemption to the defendant arises from the defendant's setting it up and resisting the plaintiff's suit to redeem, such necessity is subservient to that suit, and art. 44 or art. 91 does not apply. (Bhagvant *v.* Kondi, I. L. R., 14 Bom., 279). See also Sikhur *v.* Dulputty, I. L. R., 5 Calc., 363, which was decided under Act IX of 1871 in which there was no provision corresponding to art. 44. But if the defendant is in possession, not simply under the mortgage admitted by the plaintiff, but apparently also under his purchase of the equity of redemption, this *primâ facie* title, it is apprehended, must be displaced before the defendant can be dislodged. (See Janki *v.* Ajit, I. L. R., 15 Calc., 58, P. C.; Jagadamba *v.* Dokhina, I. L. R., 13 Calc., 308, P. C.; Hasan Ali *v.* Nazo, I. L. R., 11 All., 456). As to suits for recovery of property in cases of sales not falling under art. 44, see notes under art. 91, and Raghubar *v.* Bhikya, I. L. R., 12 Calc., 69.

It has been held in the Central Provinces that art. 44 applies whether the plaintiff asks the Court merely to set aside the sale or to restore him to *possession* by setting aside the sale. (Seetaram *v.* Nilu, 1 Cent. Pro. L. Rep., 75).

Sales in execution, or under the Land Acquisition Act, not governed by art. 44.

A suit to set aside a sale in *execution* of a decree obtained against the ward in a suit in which he was represented by the guardian is not a suit to set aside a sale by his guardian. For a rather extraordinary application of art. 44, see Prosonna *v.* Afzolonnessa, I. L. R., 4 Calc., 523, and pp. 259, 262, *supra*.

A suit to recover land which has been taken for a *public purpose* without a due compliance with the provisions of the Land Acquisition Act, the guardian of the infant owner having waived his right to substantial compensation under the Act, is not governed by this article. It is not necessary to set aside the guardians act or the illegal acquisition. (See Luchmeswar *v.* Chairman, I. L. R., 18 Calc., 99).]

Art. 45.	45.—To contest an award under any of the following Regulations of the Bengal Code :—	Three years ..	The date of the final award or order in the case.

VII of 1882, IX of 1825, and IX of 1833.

[No. 45. (No. 44, Act IX ; sec. 1, cl. 6, Act XIV). No. 45 applies to suits by any person, whether bound by the award or not. No. 46, to suits by a party bound by the award. It was held by the late Sudder Court in Calcutta, that as an auction-purchaser at a revenue-sale was not the legal representative of the former proprietor of the property sold, the rule of limitation prescribed by Act XIII of 1848 (to which this article corresponds) did not apply to a claim preferred by such a purchaser to contest the award of the Revenue Officers, though such award was binding on the former proprietor. The framers of Act XIV of 1859 (see sec. 1, cl. 6) introduced words to show that the law was to be regarded as binding on all parties whenever and under whatever title they might have acquired the property affected by the award of the Revenue Officers. (See the Report of the Select Committee on the Limitation Bill, dated 8th January 1859). This change in the wording of the law was not considered in Pureeag *v.* Shib Ram, 3 W. R., 165, as that case was decided under the old law. But in Mohima *v.* Rajcoomar (10 W. R., 22), Sir Barnes Peacock, C. J., points out that now a person is not entitled to ask the Court to rectify or set aside an award in a suit commenced more than three years after the date of the award, whether he is legally bound by the award or not. A person who is not a party to the proceedings under Reg. VII of 1822 may, however, sue to *recover* possession of property by establishing his title thereto even *after* the three years allowed by this or the next article. (Kanto *v.* Asad, 5 C. L. R., 452). Suits merely to *contest* an award.

The regulations referred to in this and the following article relate to the settlement of lands, &c., and empower the Revenue Authorities to take judicial cognizance of certain claims and disputes respecting lands, &c.

A thakbust-survey-award relating to boundaries, in Bengal, is treated as an award under Reg. IX of 1825. (See Raja Sahib Pershad *v.* Rajendra Kishore, 12 W. R., P. C., 6, 18). An award under these Regulations is an adjudication of some dispute after the parties have had notice of the proceedings. (See Hurlal *v.* Sooruj, 3 W. R., 7, and Radha *v.* Ram, 11 W. R., 389 ; Thompson, p. 115). It must be a judicial act of the Revenue Officer. (Bhanoi *v.* Maharaj, I. L. R., 3 All., 738). What is an award.

Time runs from the date of the final order of the final Revenue Authority (*e.g.*, the Board of Revenue) if an appeal has been preferred to such authority. (Kissen *v.* Mahomed, 10 W. R., 51). Where A and B were similarly affected by a survey award, and A appealed but B did not, it was held that B could not treat the order on A's appeal, as the final order in the case. (Tulsiram *v.* Mahomed, 10 W. R., 48). See notes to art. 46.] Final order.

46.—By a party bound by such award to recover any property comprised therein.	Three years ...	The date of the final award or order in the case.	Art. 46.

[No. 46. (No. 45, Act IX ; sec. 1, cl. 6, Act XIV). See the notes to art. 45. In a suit by A against B, A is not bound by an award obtained by A and B against C. (Komul *v.* Bissonath, W. R., Spl. No., p. 128, F. B.) This article applies only to suits by the parties to the award. (Kanto *v.* Asad Ali, 5 C. L. R., 452). A purchaser at a revenue-sale, not being the legal representative of any of the parties to the award, is not bound by the award. A suit by a person in possession to have his title *confirmed* is not a suit to *recover* property within the meaning of this article. A person who remains in possession for three years after the making of the revenue award is not Party *bound* by an award.

barred by this article from maintaining a suit to confirm his title. As the award does not determine the title of the parties, it is not necessary to set aside the award in such a case. (Mohima *v.* Rajcoomar, 10 W. R., 22, 24). Even if the plaintiff is actually dispossessed two years after the award, he is bound to sue within three years of the award. The ruling in the case of Mozuffer *v.* Grish (10 W. R., 71) is opposed to the wording of the law. Thomson, p. 114. See also Ganeshee *v.* Tikum, 5 N. W. P., 78.

Possession of temporary settlement-holders.

A temporary settlement of lands by the Collector, where there has been no award against the plaintiff, is no bar to his claim for a permanent settlement. If the right of the *malik* is anyhow recognized by the Collector, the possession of the person with whom a temporary settlement is made is not adverse to the malik. (Kristo *v.* Kashee, 17 W. R., 145 ; Bissessuree *v.* Kalee, 18 W. R., 198 ; Kristo *v.* Shama, 22 W. R., 520. As to *malikana* see Gopinath *v.* Bhugwat, I. L. R., 10 Calc., 697, 709). The possession of the settlement-holder in cases where malikana is reserved for the malik or zemindar must be taken to be the possession of the zemindar. (Sarat Sundari *v.* Secretary of State, I. L. R., 11 Calc., 784, 787). It has been held by their Lordships of the Privy Council that ex-lakhrajders or ex-mafiholders, whose tenures have been resumed by Government, and on their refusal to engage for the payment of the revenue, temporarily settled with a third person, are "dispossessed" by the settlement-holder if they cease to exercise any proprietary right, from the date when the settlement-holder enters into possession. In such a case it is not necessary to consider whether or not the possession of the settlement-holder is "adverse" to the original proprietor. Art. 142 (not art. 144) is applicable to cases of being "dispossessed while in possession." (Nawab Muhammed *v.* Badan Sing, I. L. R., 17 Calc., 137, P. C.)

The Court may go behind the settlement proceedings, and find that the settlement-holder holds in trust for himself and others. (Hardeo *v.* Jawahir, I. L. R., 3 Calc., 522, 525 ; Pirthi Pal *v.* Jawahir, I. L. R., 14 Calc., 493, P. C.)

Final order.

Where the law allows an appeal to the superior Revenue Officers the period of limitation runs from the date of the final order in the case. The fact that the appeal was summarily dismissed, or that the merits of the case were not entered into, does not make the order other than a final order. (Krishna *v.* Mahomed, 10 W. R., 51). But where A and B are similarly affected by an award, and A only appeals, B cannot compute the period of limitation under this article from the date of the order on A's appeal. The three years are to be computed from the date when the award becomes final, so far as the plaintiff is concerned. (Tulsiram *v.* Mahomed, 10 W. R., 48).

A suit which is within time under this article may, nevertheless, be barred by art. 142 or 144. (See Beerchand *v.* Ramgutty, 8 W. R., 209 ; Moulabux *v.* Koshoram, 10 W. R., 249, and notes under art. 11, p. 661, *supra*).]

Art. 47.	47.—By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chapter XL, or the Bombay Mamlatdars Courts Act, or by any one claiming under such person, to recover the property comprised in such order.	Three years ...	The date of the final order in the case.

[No. 47. (No. 46, Act IX ; sec. 1, cl. 7, Act XIV). Orders respecting the possession of property, passed under Chapter XII of the Criminal Procedure Code of 1882, are by virtue of sec. 3 of the Code governed by this article. (See p. 187, *supra*). Orders under no *other* chapter are governed by this article. (Durga *v.* Mangal, 1874, 7 N. W. P., 35). Bombay Act V of 1864 has been repealed by Bombay Act III of 1876 which is the Bombay Mamlatdars Courts Act here referred to.

Art. 47 contemplates a *right* to sue in ejectment being in *existence* at the time of the passing of an order under the Code of Criminal Procedure. (See sec. 145 of Act X of 1882). Even a decree for specific performance of an agreement to let the disputed land in lease, does not give the decree-holder a right to sue in ejectment, unless the decree is executed and the *pottah* is granted to him. The *pottah* when executed may take effect retrospectively from the date of the agreement, but if the *pottah* is not actually in existence at the time when an order under sec. 145 of the Code of Criminal Procedure is passed against the decree-holder, and in favor of the tenants in possession of the land, he is not bound to sue to set aside the order within three years under art. 147 ; he will have 12 years under art. 144 from the time when the *pottah* was actually executed in his favor. (Bolai Chand *v.* Samiruddin, I. L. R., 19 Calc., 646).

Order against lessee not binding on lessor.

A person who was no party to the proceeding before the Magistrate, and who does not claim under any party to the proceeding, is not bound to sue within three years under this article. The ruling in Lekhraj *v.* Court of Wards (14 W. R., 395) that the zemindar is bound by an order passed against his ijarader can hardly be supported. Mr. Starling also questions the correctness of this ruling. (Starling, 2nd Ed., p. 141). A lessor does not claim under his own lessee or tenant, and is therefore not bound by any order or decree against the latter. (See Shaikh Wahid *v.* Nanth, 24 W. R., 128 ; Rambrohmo *v.* Bunsi, 11 C. L. R., 122 ; Ram Narain *v.* Ram Coomar, I. L. R., 11 Calc., 562).

What orders are within this article.

Orders under sec. 530, Act X of 1872, or sec. 145, Act X of 1882, are governed by this article. An order under sec. 147 of Act X of 1882 (corresponding to sec. 532 of Act X of 1872) relating to easements is probably intended to be governed by this article. Orders under sec. 534 of Act X of 1872 (corresponding to sec. 522, Act X of 1882, Chapter XLIII) are also included in "orders respecting the possession of property under Chapter XL of Act X of 1872." Orders under sec. 534, Act X of 1872 or under sec. 522, Act X of 1882, as well as the orders of Mamlatdars in possessory suits in Bombay are, however, expressly deprived of effect, for the purpose of any ulterior proceedings, on the question of possession. (Lilloo Bin *v.* Annoji, I. L. R., 5 Bom., 387, 392, and p. 165, note 10, *supra*). As to orders of Mamlatdars under the old Act of 1838 and the new Acts of 1864 and 1876, see I. L. R., 14 Bom., 372, and note 10, pp. 165, 166, *supra*.

Order of attachment of Magistrate.

Where the Magistrate is unable to satisfy himself as to which party is in possession, or where he decides that neither party is in possession, and he attaches the property under (sec. 531 of Act X of 1872, or) sec. 146, Act X of 1882, his order is not "an order respecting the possession of property." (Akilandun *v.* Periasami, I. L. R., 1 Mad., 309 ; Chujmull *v.* Khyratu, 1868, 4 N. W. P. H. Ct., 65).

This article does apply where the possession of the defendant was confirmed by the Magistrate. It does not apply in favor of a party who subsequently succeeds, by a regular suit, in ousting the person whose possession was so confirmed. (Aukhil *v.* Mirza, 6 C. L. R.,

Suit to *recover* possession by *unsuccessful* party.

93). See pp. 86, 87 and 329, *supra*, as to possession notwithstanding the order. The article applies only to a suit by the unsuccessful party to recover possession against the party who is maintained in possession by the Magistrate's order. A suit by the *successful* party to recover possession after the three years is not barred by this article. (See Wise *v.* Amirunessa, 6 C. L. R., 249, at p. 255, P. C.) A suit by the unsuccessful party for *confirmation* of possession is not barred by this article. (Mohima *v.* Raj Coomar, 10 W. R., 22, at p. 24).

Suit to recover *the* property comprised in the order.

A suit by a party bound by an order of the Mamlatdar, for a partition of the whole property, a share in which was in dispute before the Mamlatdars, is not a suit to recover the property within the meaning of this article. (See Bhaguji *v.* Aniaba, I. L. R., 5 Bom., 25 and 27). Nor is a suit for partition, where the whole property was in dispute before the Mamlatdar. A claim "to recover the property" implies a claim to exclude the defendant altogether. A claim for obtaining a *share* of the property on the footing that the defendant who had been successful in the Mamlatdar's Court, held it for himself and the plaintiff *jointly* is not a claim to "recover the property" comprised in the Mamlatdar's order. (Parashram *v.* Rakhma, I. L. R., 15 Bom., 299). Before Act IX of 1871 came into operation rights could not be extinguished by limitation, in Bombay, except where the possession was of such a duration and character as to come within Regulation V of 1827. (*Ibid.*)

Nature of defendant's *title* not considered.

If a tenant-at-will claiming to have acquired a right of permanent possession obtains against the landlord a Mamladar's order in his favor, the landlord or his assignee must sue within three years as provided in art. 47. After the three years the landlord or his assignee cannot recover possession from the defendant, whatever may be the precise nature of the tenant-defendants' title to the possession. (Bapu Bin *v.* Mahadaji, I. L. R., 18 Bom., 348).

Moveable property.

There is nothing in this article to restrict it to immoveable property only. (See Kangali *v.* Zomarudonissa, I. L. R., 6 Calc., 709; Akil *v.* Peri, 1 Mad., 309).

Final order.

This article does not apply unless there has been a final order in respect of possession. Striking off a case, or ordering the Sessions Judge's letter (containing directions as to possession) to be put up with the record, is not such an order. (Dyram *v.* Beebee, 3 W. R., 174; Moshaheb *v.* Nund, 20 W. R., 316). The order of the Sessions Judge *refusing* to move the High Court to interfere with the Magistrate's order cannot be treated as the final order in the case. (See Kangali *v.* Zomarudonissa, I. L. R., 6 Calc., 709).

Verbal order.

A verbal order alleged to have been passed by the Magistrate is not an order within the meaning of this clause. (Mahomed *v.* Gunga, 2 Agra, 26).]

Art. 48.	48.—For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years ...	When the person having the right to the possession of the property first learns in whose possession it is.
Art. 49.	49.—For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Ditto ...	When the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

[Nos. 48 and 49. (Nos. 48, 47, 35, 34, 33, 26 of Act IX; sec. 1, cl. 2, Act XIV).

Art. 49 provides for (1) suits for recovery of specific moveable property not falling under art. 48; (2) suits for compensation for wrongfully taking such property; (3) suits for compensation for injuring such property; (4) suits for compensation for wrongfully detaining such property. Arts. 48 and 49 or any other article does not *specifically* provide for suits for compensation for injuring specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion. (Essoo *v.* The Sabitri, I. L. R., 11 Bom., 133, 135). The words "suit for specific moveable property" probably include suit for a declaration of right to specific moveable property. The general article for compensation for torts is art. 36. Suits covered by arts. 48 and 49.

A suit by the rightful owner of a lost chattel, against the finder for its recovery, comes under art. 48. The trover or finding of lost property is innocent, unless it is followed by conversion. (Per Grove, J., in Sheckman *v.* Foster, 11 Q. B. D., 99). Property, in respect of which theft or any other offence has been committed, may, if produced before a Criminal Court, or seized by the police, be restored to the owner under secs. 517, 518 and 523 of the Criminal Procedure Code of 1882. A suit for restitution or compensation, against the thief or against a transferee of the thief, falls under art. 48. Property acquired by extortion or cheating was mentioned in art. 48, Act IX of 1871. But the words "dishonest misappropriation or conversion" probably include "extortion" and "cheating."

Under art. 49 limitation runs from the time when the wrong complained of is done; under art. 48 it runs from the time when the plaintiff learns in whose possession the property is. Starting point.

It has been held in England that when a conversion consists of a wrongful sale of goods, the owner of them may waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff, *i.e.*, under art. 62 of this Act. (See Underhill on Torts, 250; 1 B. and Ad., 241). Waiving the tort.

It has been held by the Privy Council that if the defendant is not the person who wrongfully converted the goods, but an agent who sold the goods and held the sale-proceeds on account of such person, the suit does not fall either under 49 or under 62 of this Act. (Gurudas *v.* Ramnarain, I. L. R., 10 Calc., 860, P. C.) Suit against agent of converter.

Property left by the owner in the defendant's possession is not wrongfully converted until the defendant refuses to give it up to the owner. (Edwards *v.* Clay, 28 Beav., 845). Conversion by bailee of owner.

If the owner's son fraudulently took out the goods from his father's possession, and deposited them with the defendant (who did not know that the goods belonged to any person other than the son) the owner (*i.e.*, the father) can not sue for conversion or detinue until after *demand, and refusal*, to give up the goods to him. (Miller *v.* Dell, 1891, 1 Q. B., 468). Conversion by bailee of owner's son.

"Moveable property" includes money (see arts. 29 and 89; Jagjivan *v.* Gulam, I. L. R., 8 Bom., 17), but "specific moveable property" can hardly include money. Specific property is property of which the owner is entitled to demand the return *in specie*. (I. L. R., 11 Bom., 133, 137). The phrase "specific moveable property" is only apt when the thing to which you are entitled is in the possession of some third party. (*Ibid.*) A Division Bench of the Allahabad High Court has held that a suit to recover a sum of money entrusted to the defendant for a specified purpose and misappropriated by him is a suit to which art. 48 applies. (Rameshar *v.* Mota Bhikh, I. L. R., 5 All., 341). See notes to art. 51 as to the distinction between money Specific moveables.

Wrongful conversion.

and other chattels. Where moveable property belonging to Z has been wrongfully converted by A, and such property has been sold by A's brother on A's account, and the sale proceeds are subsequently held by A's brother on account of A's widow, there is no dishonest misappropriation or conversion on the part of A's brother, although he is responsible to Z for the money in his hands. (Gurudas *v.* Ramnarain, I. L. R., 10 Calc., 860, P. C.) A mortgagee of a house, with power of sale, took possession of the house and sold it to a third person. At the date of the mortgagee's taking possession of the house certain timber and other articles were stored in the house. The mortgagee did not know this when he sold the house and gave delivery of possession to the purchaser. The mortgagor of the house may sue the mortgagee under art. 49 for the specific timber or for compensation for wrongfully taking the same and not accounting for it. (Passanhu *v.* Madras D. and B. Society, I. L. R., 11 Mad., 333).

Moveable property.

Standing crops are not moveable property. (Pandah *v.* Jennuddi, I. L. R., 4 Calc., 665 ; Sadu *v.* Sombhu, I. L. R., 6 Bom., 592), but when such crops are cut, they may be treated as moveable property. Tiled huts (Rajchunder *v.* Dhurmo, 10 W. R., 416), trees (Umed *v.* Daulat, I. L. R., 5 All., 564), and fixtures (Miller *v.* Brindabun, I. L. R., 4 Calc., 946) are not moveable property. But fruits on trees have in one case been held to be moveable property. (*In re* Nasir *v.* Karamut, I. L. R., 3 All., 168).

Possession when unlawful.

As to when the possession of moveable property agreed to be sold and partly paid for, becomes unlawful on the part of the vendor, see sec. 78, Act IX of 1872. Where an agreement is made for the sale of immoveable and moveable property, sec. 85, Act IX of 1872 applies. The possession of the vendor or of his subsequent transferee in such a case becomes unlawful from the date of a decree for specific performance of the agreement. (Dhondiba *v.* Ramchandra, I. L. R., 5 Bom., 554). The possession of a specific moveable property bequeathed to a legatee becomes unlawful on the part of the legal representative of the testator, when his authority is cancelled and he is ordered to return the property to the legatee or his vendee. (Issan Chunder *v.* Juggut, I. L. R., 9 Calc., 79).

Title-deeds.

In the absence of an article corresponding to art. 33 of Act IX of 1871, a suit to recover title-deeds is governed by these articles. The possession of title-deeds is justified by possession of the estate to which they refer, and, therefore, for the time that the holder of them is in possession of the estate, limitation would not operate in his favor. (Shephard, p. 39 ; Plant *v.* Cotterell, 27 L. J. Ex., 198). In a suit for wrongfully detaining title-deeds, time runs from the date when the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful. (See No. 33, Act IX of 1871). The mere retention by A of title-deeds of property mortgaged to him, *after* the redemption of the mortgage, is not unlawful, though the mortgagor on redemption has a legal right to demand delivery. The mortgagee's retention of the title-deeds, after a lawful *demand* for delivery has been made, is an illegal detention, and limitation under art. 49 runs from the date of such demand. (Subbakka *v.* Maruppakkala, I. L. R., 15 Mad., 157). Suits for *compensation* for the wrongful conversion of goods are not *expressly* provided for. See notes to art. 32.

Injuring property.

The expression "injury to specific moveable property" in art. 49 must be cut down by the connection in which those words are used, and limited to the case of injury to moveable property of the plaintiff in the possession of the defendant in whose custody it is injured. (I. L. R., 11 Bom., 133). Beating or injuring the plaintiff's

dog or mare is a trespass or injury (Underhill, p. 241), to which art. 36 will apply. If a trespass to chattels amount to a deprivation of possession to such an extent as to be inconsistent with the right of the owner, as by taking, using or destroying them, it then becomes a wrongful conversion. (*Ibid.*) Some of the former actions of trover and detinue come under arts. 48 and 49. (See Mudivarapa *v.* Fakirapa, I. L. R., 7 Bom., 427, 429). Conversion.

Art. 49 is the most general article applicable to suits for moveable property. But the article is not applicable to a suit to establish a right to *inherit* the property of a deceased person, and to recover possession of the same, even if such property be moveable property. (Mahomed Reasat Ali *v.* Hasin Banu, I. L. R., 21 Calc., 157, P. C.) Art. 120 is applicable to a suit by one heir against another for the moveable property of a deceased ancestor. (*Ibid.*) Arts. 123, 126 and 127, which allow a period of twelve years, apply to certain suits in respect of moveable or immoveable property. Art. 133 prescribes a period of twelve years for suits for the recovery of moveable property sold by a trustee, depositary or pawnee. Art. 145 allows a period of thirty years for the recovery of moveable property from the depositary or pawnee himself.] Suits for moveables by heirs of owner. Other articles about moveables.

50.—For the hire of animals, vehicles, boats or household furniture.	Three years ...	When the hire becomes payable.	Art. 50.

[No. 50. (No. 49, Act IX ; sec. 1, cl. 8, Act XIV). Art. 50 refers to the hire of certain things for use (*locatio rei*). Art. 56 refers to the hire of labour and services. Art. 50 and many of the following articles in Part VI treat of actions *ex-contractu*. A suit for the hire of ships or for freight for the carriage of goods would probably come under art. 115. Where a contract is registered, a suit for compensation for its breach is governed by art. 116, and not by any other article.] Other articles about hire.

51.—For the balance of money advanced in payment of goods to be delivered.	Three years ...	When the goods ought to be delivered.	Art. 51.

[No. 51. (No. 50, Act IX) Balance—That which expresses the difference between the debtor and creditor sides of an account.—(Wharton).

As this is the article where the word "money" occurs for the first time, we should here consider the legal import of the term. It seems to be thought that "money" only means coin in gold, silver or copper. But in law "money" means and includes not only coin, but also generally any paper, obligation or security that is immediately and certainly convertible into cash, so that nothing can interfere with or prevent such conversion. (Per Stuart, C. J., in a reference by the Board of Revenue, I. L. R., 3 All., 788, 793). "Money" includes any currency usually and lawfully employed in buying and selling as the equivalent of money, as banknotes and the like.—Webster. "Money" is the name given to the commodity adopted to serve as the *merchandise bennale*, or universal equivalent of all other commodities, and for which individuals readily exchange their surplus products or services.—Brande. Even provincial notes, if received as money, are money, but stocks are not money. (Roscoe's Digest, 543). For the protection of commerce, "money" cannot be pursued into the hands of a *bonâ fide* holder to whom it has The term "money" explained.

passed in circulation, but this rule does not apply to other chattels. (See Lewin on Trusts, 7th Ed., p. 763). Trust-money mixed with trustees' own money may be followed by the *cestui que trust*. The maxim that money has no ear-mark is no longer law. (Brett's Equity Cases, 2nd Ed., pp. 3 and 4).

If there is no express stipulation as to the time of delivery, and the time cannot be ascertained by reference to any usage of the trade, or to the course of dealing between the parties, a reasonable time from the date of the advance of the money should be allowed. (Boiddonath *v.* Lalunnissa, 7 W. R., 164).]

Art. 52.	52.—For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years ...	The date of the delivery of the goods.

[No. 52. (No. 51, Act IX). Arts. 52 and 53 are based on the ruling in Satcowry *v.* Kristo Bangal, 11 W. R., 529. Under art. 52 the date of the delivery of each article is the date of the cause of action, for its price. Where all the items of an account are on one side, as for instance, in a tradesman's bill, the fact that some items are within the period of limitation does not take the earlier items out of the operation of the statute. (Banning, 200; 11 W. R., 529; and notes to art. 85). Payments made on account by the customer, from time to time, may, nevertheless, be applied in reduction of so much of the claim as is barred by limitation. (Baboo Thakoor *v.* Baboo Mohesh, 24 W. R., 390). As to what constitutes delivery, see secs. 90—92 of the Contract Act.

There is no special provision in this Act for suits for the price of goods sold by retail. Sec. 1, cl. 8, Act XIV of 1859 made a special provision for such suits as opposed to suits for the price of goods sold wholesale.]

Art. 53.	53.—For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years ...	When the period of credit expires.

[No. 53. (No. 52, Act IX). See notes to art. 52.

Art. 53 (not art. 52) has been applied to a case where the price of the goods was not claimable as of right on the date of each delivery. The price was payable when the whole of the goods had been supplied. (Pragi *v.* Maxwell, I. L. R., 7 All., 284).

If goods are sold on six months' credit, and payment is to be made then by a bill at two *or* three months' at the purchaser's option, this is in fact a nine months' credit, and limitation will not commence to run till the end of the nine months. (Starling, p. 118; Help *v.* Winterbottom, 2 B. and Ad., 431).]

Art. 54.	54.—For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years ...	When the period of the proposed bill elapses.

[No. 54. (No. 53, Act IX).

When the contract was for six months' credit, the payment then to be made by a bill at two months, it was held that an action for the price would not lie at the expiration of six months, and that the time began to run from the expiration of (6+2=) 8 months. It was observed that the only action that would lie before the expiration of the period of the proposed bill was an action, not for the price, but for breach of contract in not giving the bill. (Help *v.* Winterbottom, 2 B. and Ad., 431 ; Darby and Bosanquet, p. 19). Art. 54 adopts the principle of this ruling.]

55.—For the price of trees or growing crops sold by the plaintiff to the defendant, where no fixed period of credit is agreed upon.	Three years ...	The date of the sale.	Art. 55.

[No. 55. (No. 54, Act IX).

Suits for the price of goods, trees and growing crops are provided for in arts. 52 to 55. There is no such article for the price of land or of immoveable property other than trees or growing crops. A suit for the possession of growing trees is governed by art. 142 or art. 144.

A suit to enforce a vendor's lien for unpaid purchase money is governed by art. 111.]

56.—For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years ...	When the work is done.	Art. 56.

[No. 56. (No. 55, Act IX).

A suit for the price of work done by an Attorney or Vakeel is specially provided for. (See art. 84, and W. R., Gap. No., p. 18). A suit by a goldsmith to recover the price of his labor in making ornaments does not fall under art. 7. It comes under this article (see notes to art. 7). Where a duty requires a continuation of services, the completion of the duty is the cause of action. (Angell, 148). The work must have been done at the request of the defendant. Such request may be implied from the circumstances of the case. The work need not be done by the plaintiff personally. The price of work done at defendant's request, being several sums paid by the plaintiff to workmen from time to time, may be sued for within three years of the completion of the work. (Sundaram *v.* Sankera, I. L. R., 9 Mad., 334).]

57.—From money payable for money lent.	Three years ...	When the loan is made.	Art. 57.

[No. 57. (No. 56, Act IX ; sec. 1, cl. 9, Act XIV). A suit for money lent in the ordinary sense of that expression, is for a loan repayable at once, or what is the same thing in point of law, repayable on demand. Where there is a written or verbal agreement fixing a certain date for the repayment of the money, limitation runs from the specified date of payment. Where such agreement is verbal, art. 115 applies. (Ramchand *v.* Ramchand, I. L. R., 10 Calc., 1033 ; Ramasami *v.* Muthusami, I. L. R., 15 Mad., 380, 381 ; where it is written, art. 66, art. 115 or art. 116 will apply.

Subsequent events may bring about a new state of things, impose a new obligation on the debtor, and give the creditor a *fresh cause*

of action, although there is no written acknowledgment of liability under sec. 19. A debtor, who for years has been insisting that his creditor shall take payment in a particular mode, cannot, where it is decided that the creditor cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all. (Bassu Kuar *v.* Dhum Sing, I. L. R., 11 All., 47, 56, P. C.) See art. 97 and p. 221, *supra*.

Repayable on production of Deposit Receipt.

As to a deposit loan made repayable on production of the deposit receipt, see Atkinson *v.* Bradford, 25 P. B. D., 377 (where the receipt was lost or destroyed); Manoel *v.* Honkong Bank, I. L. R., 14 Bom., 498 (where the receipt was in the possession of a third person). See also note, p. 221, *supra*.

Lien on moveable property.

A suit to recover money lent by enforcing a lien on *pledged moveable* property is governed by art. 120. (Doulat *v.* Jiwan, Punj. Rec. No. 116 of 1881, cited by Rivaz, 3rd Ed., p. 148). But see notes to art. 80 and Vitla *v.* Kalekara (I. L. R., 11 Mad., 153). Ghose and Gordon, JJ., citing Surwar *v.* Shahazaa (9 W. R., 171, 173), follow the Punjab decision, and an unreported judgment of the Bombay High Court (Branson's Digest, p. 219) and dissent from the Madras ruling. (Nimchand *v.* Jagobandhu, decided on the 21st July 1894 and reported in the *Statesman* of the following day). A claim to prove a debt against the estate of an insolvent is treated as a *suit* by the creditor, and is governed by one or other of these articles. (*In re* Agabeg, 12 C. L. R., 165. See notes to art. 174).]

Art. 58.	58.—Like suit when the lender has given a cheque for the money.	Three years ...	When the cheque is paid.

[No. 58. (No. 57, Act IX).

A cheque is a bill of exchange generally drawn on a banker and payable on demand.

If a loan is made by means of a cheque given by the lender, a cause of action does not arise against the debtor till the cheque is cashed, even if the debtor makes use of the cheque and receives credit for it from his own banker before the cheque is actually paid. (Garden *v.* Bruce, L. R., 3 C. P., 300; Banning, 25). The possibility of the cheque being dishonored, prevents the loan from being considered as made when the cheque is given.]

Art. 59.	59.—For money lent under an agreement that it shall be payable on demand.	Three years ...	When the loan is made.

[No. 59. (No. 58, Act IX).

As to the change in the starting points of limitation made by this Act, see pp. 57, 222, 223, *supra*, and compare Nos. 72 and 73.

To pay on demand.

"Where a man promises to pay a sum of money, &c., on demand, which it is his duty to pay whether a demand be made or not, then the money becomes payable at once, and no demand is necessary before suing him for it; as, for instance, in the case of money lent, and money due for goods sold or for work done. But where a promise is made in consideration of some collateral thing being done on demand, there the demand must be made before the promise can be enforced, as in the case of a promise to pay Rs. 100 to B, if A should go to Dacca on demand, or if A should pay Rs. 200 to C upon demand." (Per Garth, C. J., in Ramchunder *v.* Juggut Monmohinee, I. L. R., 4

To do a collateral thing on demand.

Calc., 283, 294). So where a person is bound by an agreement to buy his co-parcener's share, on his refusing to sell his own share on demand, to such co-parcener, the demand is a condition precedent to enforcing the agreement. (Verasami *v.* Ramsami, I. L. R., 3 Mad., 87).

A promise that the money shall be "payable within six years on demand" is not governed by art. 59 or art. 73. (Sanjivi *v.* Kama, I. L. R., 6 Mad., 290; see notes to arts. 73 and 80).

Where the money is "payable three months after demand," a demand is necessary. (Brown *v.* Rutherford, 14 Ch. D., 687; see also art. 72). To pay after demand.

Sums paid to the credit of a customer with his banker, though usually called deposits, are in truth loans to the banker, as money paid to a banker becomes at once part of his general assets, and he is merely a debtor for the amount. (Foley *v.* Hill, 2 H. L. Cas., 28; Banning, 14: see also Hinguh *v.* Debee, 24 W. R., 42). Even after the introduction of art. 60 in the present Limitation Act, it has been observed that money lodged with another person, whether a banker or not, under an agreement that it shall be repayable with interest on demand, although called a deposit, is in point of law a loan. It has been said that, unless the recipient of the money is invested with the character of a trustee, the transaction is a loan, and not a deposit. (Ram Shokh *v.* Brohmomoyee, 6 C. L. R., 470; *In re* Agabeg, 12 C. L. R., 165, 168). But Wilson and O'Kinealy, JJ., in Issur Chunder *v.* Jibun (I. L. R., 16 Calc., 25), held that money deposited with a banker under an agreement that it shall be payable on demand is, in ordinary language, never called a loan, and that art. 60 specifically provides for such deposits as opposed to deposits recoverable *in specie* and provided for in art. 145. The learned Judges were of opinion that to apply art. 60 to express trusts might lead to great confusion, and might curtail very seriously the beneficial effects of sec. 10 of the Act, and that the word deposit does not ordinarily, and cannot have been used in art. 60 to, mean "trust." They were further of opinion that in the *absence* of art. 60, a balance with a banker might be treated as money lent, under art. 59, or as money received to the use of the customer, under art. 62. But interpreting the term "deposit" according to the ordinary usage of the language, the case of the banker and his customer (even when there is an agreement to pay interest) is exactly a case to which (the new) art. 60 applies. And the provisions of art. 60 being more specific than the provisions of arts. 59 and 62, must in such a case prevail. See notes to art. 60. The Bombay High Court still adheres to the view that a deposit with a banker is a *loan*. (See Ichha *v.* Nathe, I. L. R., 13 Bom., 338). As to a deposit loan for a year repayable on production of the deposit receipt, see Manoel *v.* Hongkong Bank, I. L. R., 14 Bom., 498, notes under art. 57 and p. 221, *supra*. The case of money deposited in a sealed bag, or which is otherwise ear-marked and *recoverable in specie* (not *payable*) is different. (See Banning, 15). Such a case falls under art. 145.] Loans and deposits. Deposits and trusts.

60.—For money deposited under an agreement that it shall be payable on demand.	Three years ...	When the demand is made.	Art. 60.

[No. 60. There was no corresponding article in Act XIV of 1859 or Act IX of 1871. A *loan* repayable on demand is payable at once, but a deposit of money repayable on demand, or a bill or note payable at a fixed time after demand, is not payable at once. Art. 60

applies specially to cases of deposits with bankers. (See the notes to the preceding article and I. L. R., 16 Calc., 25).

Money held in deposit under a *statutory* enactment such as sec. 31 of Act XI of 1859, is *not* held under any *agreement*. (Secretary of State *v.* Fazal Ali, I. L. R., 18 Calc., 234, at p. 241). Art. 120 applies to suits to recover money so deposited. (Secretary of State *v.* Abdul Bari, I. L. R., 20 Calc., 51, F. B.)

Lending and depositing.

A lends money to B when A grants a loan to B for B's accommodation. A deposits money with B within the meaning of art. 60 when A lodges the money in B's hands for safe keeping, not so much for B's accommodation, as for his own convenience. The expression "payable on demand" bears one meaning in the first case, and another meaning in the second case. (See the 3rd columns of arts. 59 and 60).

The use of the word deposit instead of *loan*, the position of the parties and the other circumstances of the case may induce the Court, even in the case of persons other than bankers, to hold that the transaction is a deposit within the meaning of art. 60. But the *mere* use of the term "deposit" can not alter the substance of the transaction. (Ishur *v.* Jibun, I. L. R., 16 Calc., 25, at p. 30).

Depositing as security.

A sum of money deposited as security for the discharge of an office, does not come under this article (see Upendra *v.* Collector, I. L. R., 12 Calc., 113).

First unqualified demand.

As to the onus of proof of the demand, see pp. 94—96, *supra*. If the first demand has been a complete and unqualified demand, the period of limitation begins to run from the time of such first demand. (See Madhavbhi *v.* Fattesing, 10 Bom., 487).]

Art. 61.	61.—For money payable to the plaintiff for money paid for the defendant.	Three years ...	When the money is paid.

[No. 61. (No. 59, Act IX). This is a general article. For special articles relating to similar matter, see arts. 79, 81, 82, 99, 100 and 107.

An action for money paid at the request, expressed or implied, and to the use of the defendant, is governed by this article. The language of this article is applicable to suits for money paid to the use of the defendant even when the money has been paid without any request on his part. Whether, or under what circumstances, such suits are *maintainable* is a different question.

When such suit is maintainable.

Such a suit is maintainable when the plaintiff has been legally compelled to pay, or being legally compellable to pay has paid, a debt or claim for which the defendant is liable. (Bullen and Leake, 4th Ed., 276; sec. 69, Indian Contract Act). A tenant agrees to pay certain taxes for which the landlord only is liable. The tenant failing to pay, the landlord pays the taxes. The landlord, it has been held in England, cannot sue for "money paid for the defendant," but must sue on the original *agreement*. (Spencer *v.* Parry, 3 A. and E., 331. See Bullen and Leake, 278). Giving a note which is accepted as payment is equivalent to money paid. (*Ibid.*, 276; see notes to sec. 20). Limitation runs from the time when the money is actually paid, not when the money is demanded or sued for. (Toraballi *v.* Nilrutton, I. L. R., 13 Calc., 155).

In one case it was doubted whether a suit against the Secretary of State for India in Council, who is only a nominal defendant, was a suit to which this article would be applicable. (See Doya Narain *v.* The Secretary of State, I. L. R., 14 Calc., 256). But several other articles speak of the "defendant," and one of these articles, *viz.*,

art. 144, must often be applied to suits against Government or the Secretary of State in Council. And in The Secretary of State *v.* Guru Prosad (I. L. R., 20 Calc., F. B.), the learned Judges do not appear to have been pressed by the doubt raised in Doya Narain's case.

Before we apply art. 61 to a particular case, we must see if arts. 81, 82, 99, 100 or 107 does not apply to it. See notes to art. 99.

Where one of two brothers, borrowing money in his own name, applies it in payment of a joint-debt, and borrows again to pay off the first loan, and then repays the second loan from his private funds, a suit for contribution against the other brother must be brought within the prescribed period, from the date of the application of the money in payment of the joint-debt, and not from the date of the payment of the first or second loan. (See Ramkisto Roy *v.* Muddun Gopal Roy, 12 W. R., 194; Sunkur *v.* Goury, I. L. R., 5 Calc., 321; Aghore *v.* Grish, I. L. R., 20 Calc., 18). *A personal* debt of a member of even a joint-family, even if contracted to enable him to defray the expenses common to him and the other members of the family, does not thereby become a *family* debt. (I. L. R., 20 Calc., 18, at p. 21). Where the suit is brought by the manager of a joint-estate of an undivided family in respect of a payment made by him on account of the estate, the same rule applies under art. 107. Other suits for contribution are provided for by arts. 99 and 100. Arts. 81 and 82 apply to special cases of "money payable to the plaintiff for money paid for the defendant." Where several provisions are applicable, that which is the most specific must prevail. (Ishur *v.* Jiban, I. L. R., 16 Calc., 25). Extinguishing a debt by giving a new security is not payment. (Bullen and Leake, 4th Ed., 276).] Personal and family debts.

62.—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years ...	When the money is received.	Art. 62.

[No. 62. (No. 60, Act IX).

Compare arts. 87 and 97. With special reference to the form of action "for money had and received by the defendant to the plaintiff's use" in the Courts of law in England, Sir Barnes Peacock, C. J., delivering the judgment of the Full Bench, said: "Nothing was more likely to mislead or to confuse than converting a suit brought in the Mofussil Courts to the forms adopted according to the English procedure." (Gongaram *v.* Kartick, 9 W. R., 514, 516, F. B.) But Act IX of 1871, No. 60, as well as the present article in the Act of 1877, appears to point to the well-known English action in that form, and it has been held that this article should be read in connection with the English law so as to include cases of constructive receipts for the plaintiff's use. (Raghumoni *v.* Nilmoni, I. L. R., 2 Calc., 393). But Mitter and Tottenham, JJ. (in Nundo Lall *v.* Meer Aboo, I. L. R., 5 Calc., 597) appear to have construed the language of this article more literally; Stuart, C. J., and Spankie, J. (in Ramkishen *v.* Bhawoni, I. L. R., 1 All., 333) seem to prefer the stricter interpretation according to which the article is not applicable to cases where the defendant *consciously* received the money for his *own* use, and *not* as belonging to plaintiff. But in Hanuman *v.* Hanuman, I. L. R., 19 Calc., 123, P. C., their Lordships of the Privy Council held that money received by the vendor of property as its price is "money had and received" to the account of the vendee within the meaning of art. 62, if there never was any consideration for the purchase, that is, if the sale was *ab initio* void. The price Does this article apply to constructive receipts for plaintiff's use? P. C. Cases.

paid by the vendee though actually (and consciously) received by the vendor as money payable to him is, in such a case, *deemed* to have been received for the use of the vendee from the moment of its payment. And in Gurudas *v.* Ram Narain (I. L. R., 10 Calc., 860, 864, P. C.), their Lordships point out that if the money *when received* is not received for the plaintiff's use, a mere equitable claim to follow the money in the hands of the defendant is not governed by this article. Mr. Starling (at p. 124 of his work) observes: "It may be that the article is confined to those cases in which the defendant, *at the time* of receipt *in fact, or by presumption or fiction of law*, receives the money, to the use of the plaintiff, and excludes those cases in which the receipt becomes one to the use of the plaintiff by virtue of some *subsequent* event." The words "received for the plaintiff's use" should not therefore be construed literally. Art. 62 applies if when the money is *first* received, it is *actually* or *constructively* received "for the plaintiff's use." The two Privy Council cases lead to this conclusion. And Collins, C. J., and Ayyer, J., appear to be of the same opinion. According to these learned Judges, art. 62 is not applicable where the *subsequent* reversal of a decree or order of a Court makes the money, received by the defendant under the original decree or order, recoverable by the plaintiff. (Narayana *v.* Narayana, I. L. R., 13 Mad., 437, at p. 442). Arts. 87 and 97 expressly provide for two special cases in which *some subsequent* events render the money recoverable by the plaintiff as money "had and received to his use."

Applies where money at time of receipt is actually or constructively received for plaintiff's use.

Where the head of an office draws from the treasury a sum of money to pay the establishment, but fails to pay a clerk under him, a suit for the pay of such clerk against the head of the office is a suit for money *actually* had and received by the defendant for the use of the clerk. (Abhoya *v.* Haro, 4 B. L. R., App., 68).

Actual receipt.

In England, in the ordinary action for money had and received by the defendant for the use of the plaintiff, money is commonly recoverable against a perfect stranger, and is continually resorted to, to obtain the plaintiff's money wrongfully withheld. For instance, this action is maintainable to recover from a party who has wrongfully received the known and accustomed fees of an office belonging to another; and where the defendant has wrongfully obtained the plaintiff's money from a third party, as by a false pretence, it may be recovered in this form of action. It has also been held that this form of action lies to recover money paid under a *void* authority. (Per Levinge, J., in Harrish Chunder *v.* Azimoodeen, Sutherland's Special Number, pp. 181, 183). And Lord Mansfield (in Moses *v.* Macfarlane, 2 Bar., 1005) held that this equitable action lies for money paid by mistake, or upon a consideration, which happens to fail, or for money got through imposition or extortion or oppression, or an undue advantage taken of the party's situation contrary to laws made for the protection of persons under those circumstances. In England this form of action lies if it is *contra aequum et bonum* that the defendant should retain the money against the plaintiff. (See Smith's Leading Cases, Vol. II, 8th Ed., p. 429). But it has been held by the Privy Council that a *mere* equitable claim to follow money in the hands of the defendant does not come under this article. (I. L. R., 10 Calc., 860). It has also been held by the same authority that (unlike the English law) the form of action referred to in art. 62 does not apply to cases in which the receipt becomes one "to the use of the plaintiff" by virtue of a *subsequent* event. (I. L. R., 19 Calc., 123, P. C.)

English law.

Two P. C. Cases.

Art. 62 has been read in connection with the English law and considered to be applicable in the following cases:—

Rulings applying art. 62 to *constructive* receipts.

1. Where the plaintiff sued for money overpaid by him to the defendant upon the supposition that it was due, that is, for recovery

of money paid by mistake. (Radhanath *v.* Bamachurn, 25 W. R., 415). But see notes to art. 96, and Venkala *v.* Krishna, I. L. R., 6 Mad., 344; Mothura *v.* Debendra, I. L. R., 12 Calc., 533.

2. Where money was deposited in the Collectorate in the name of the plaintiff, and the defendants, without the knowledge or consent of the plaintiff, fraudulently took out the money from the Collectorate. (Raghumoni *v.* Nilmoni, I. L. R., 2 Calc., 393).

3. Where the plaintiff's decree had been sold in execution, and purchased by the defendant, who realized certain monies under that decree, and the sale in execution being set aside, plaintiff sued for the money realized by the defendant (Bhowanikuar *v.* Rikhiram, I. L. R., 2 All., 354; see also Webor *v.* Gaddai, 2 C. L. R., 165). Here, however, the *subsequent* setting aside of the sale rendered the money recoverable by the plaintiff, and the correctness of the ruling may therefore be questioned.

4. Where money realized in execution against a judgment-debtor was under an erroneous and *void* order of the Appellate Court made over to one of two different decree-holders, and the other sued for the money by establishment of his preferential right to the same. (Ramkishen *v.* Bhowani, I. L. R., 1 All., 333, F. B.) It is apprehended that *all* suits under sec. 295, Civ. Pro. Code, and cl. 4, sec. 149, Bengal Tenancy Act (VIII of 1885) are governed by art. 62. (See Vishnu *v.* Achut, I. L. R., 15 Bom., 438, at p. 441, and pp. 668 and 669, *supra*). As to money paid under a *void* authority, see also Harrish Chunder *v.* Azimoodeen, Suth. W. R., Special Number, pp. 181, 183.

5. Where the money in question was deposited by the plaintiff with the defendant, pending negotiations for a new lease, and the arrangement was, that, if the new lease was granted, the money deposited should be treated as part of the security to be given for the due performance of the lease, but that, if no new lease were granted, the money should be returned, and the negotiations falling through, the plaintiff sued for the recovery of the money. (Johuri *v.* Thakoor, I. L. R., 5 Calc., 830). In as much as it was expressly *stipulated* that the money should be returned if the new lease were not granted, art. 115 might also apply, but as the suit was not for *compensation* for breach of contract but for return of the money deposited, the learned Judges who decided the case considered art. 62 to be more appropriate. But the money in this case did *not* (even in the eye of law) become "money received by the defendant for the plaintiffs' use" *until* the failure of the negotiations. It may be observed that art. 97 provides specially for suits for "money paid upon an existing consideration which afterwards fails;" and art. 115 has been held to be applicable to suits for the recovery of money agreed to be paid on a certain date.

6. Where the plaintiff claimed, as one of the two heirs of B, a moiety of monies which at the time of B's death were deposited with a banker, and which the defendant, the other heir of B, had received from such banker. (Kundun Lal *v.* Bansidhar, I. L. R., 3 All., 170). Where the plaintiff sued for his share of money realised by the defendant under a decree obtained by him in his name alone, although the bond on which the decree was obtained belonged to the plaintiff and the defendant jointly. (Thakur Parsad *v.* Portab, I. L. R., 6 All., 442). See also Arunchala *v.* Ramasomya, I. L. R., 6 Mad., 402.

7. Where the plaintiff sued for his share of an allowance attached to an hereditary office, against another sharer or alleged sharer, who had improperly received the plaintiff's share of the allowance.

(Harmukh *v.* Hurisukh, I. L. R., 7 Bom., 191 ; Desai *v.* Desai, I. L. R., 8 Bom., 426 ; Dulabh *v.* Bansidhar, I. L. R., 9 Bom., 111 ; Raoji *v.* Bala, I. L. R., 15 Bom., 135.

8. Where one co-sharer sued another for a moiety of the whole rent received by the latter. (Tellis *v.* Saldauha, I. L. R., 10 Mad., 69, 73).

9. Where the plaintiff sued to recover back the purchase-money paid by him to the defendant's father as consideration for a transfer by the latter of certain property, such transfer being void under the law. (Hanuman *v.* Hanuman, I. L. R., 15 Calc., 51). Art. 97 does not apply to the case. The failure of consideration though not manifest at the time of the transfer, was a failure from the beginning, and the defendant's father was held to have received the money for the plaintiff's use on the date of the transfer. This rule laid down by the Calcutta High Court is unexceptionable if the sale is *ab initio* void. But as observed by their Lordships of the Privy Council on appeal, the sale in this particular case being only a sale of joint-family property by the father (under the Mitakshara or Mithila law) the sale was not *void* but only *voidable* under the Mitakshara or the Mithila law, and that art. 97 was applicable to such a case. (See I. L. R., 19 Calc., 123, P. C.)

It has been held that a suit brought under sec. 315 of the Code of Civil Procedure to recover from the decree-holder the purchase-money paid by the plaintiff (who was the auction-purchaser) on the ground that the judgment-debtor possessed no saleable interest in the property sold is governed by art. 120. (Nilakanta *v.* Imamsahib, I. L. R., 16 Mad., 361). Though the sale in this case was only voidable, art. 97 was inapplicable on other grounds.

10. Under the Collector's order, the plaintiff was obliged to pay the defendant Rs. 200. On appeal the Commissioner modified the Collector's order, and reduced the amount payable by plaintiff to Rs. 76. The plaintiff's suit for recovery of the excess, it has been held, is governed by this article. (Ladje *v.* Musabi, I. L. R., 10 Bom., 665). Here, however, it was the *subsequent* modification of the order which rendered the money recoverable by the plaintiff. See I. L. R., 13 Mad., 437, at p. 442.

On the other hand, it has been held that art. 62 does not apply to the following cases :—

Where art. 62 has *not* been applied.

1. Where the sale-proceeds of a certain property were retained by the vendor, and the plaintiff (a third person) claimed a portion of the same as a zemindari-due under a custom obtaining in the mehal. (Kirath *v.* Ganesh, I. L. R., 2 All., 358). Here the obligation arose out of a *customary* liability.

2. It was held by a Division Bench of the Calcutta High Court (Secretary of State *v.* Fazal Ali, I. L. R., 18 Calc., 234) that art. 62 applied to a suit by a defaulting proprietor for the residue of the sale-proceeds of his estate which had been sold for arrears of revenue under Act XI of 1859. The residue or surplus of the sale-proceeds, it was held, was *received* by the Collector, under sec. 31 of the Act, for the *use* of the defaulting proprietors. But in a recent Full Bench case (Secretary of State *v.* Guru Prosad, I. L. R., 20 Calc., 51) it has been held that art. 62 does not apply where the defendant's obligation to pay the money claimed arises from a *statutory* liability to pay it. Mr. Justice Prinsep was further of opinion that if art. 62 applied, it would be impossible to determine the time *when* the Collector could, in any sense, be said to have *received* the residue for the plaintiff's use. (*Ibid*, p. 59). It has

been held by the Full Bench that art. 120 applies to such a suit. In this case Mr. Justice Pigot was of opinion that the Collector or the Government might be treated as a *trustee* for the defaulting proprietor. It has been held in England that a suit for money not accounted for and due from a Receiver under the Court is not an ordinary suit for money had and received. The Receiver is a trustee of such money for the persons entitled thereto, and cannot, as against them, avail himself of the Statute of Limitations, although his final accounts have been passed, and his recognizance vacated. (Seagram *v.* Tuck, 18 Ch. Div., 296). May sec. 10 apply?

3. Where compensation money for lands taken up by Government had been lying in the Collectorate, and the defendant took out the money as the mokurariдar of the lands, and the plaintiff, after setting aside the mokurari lease, which had been improperly granted by his deceased aunt, sued to recover the money so received by the defendant. (Nundo Lall *v.* Meer Aboo, I. L. R., 5 Calc., 597). Here the lease had to be set aside by the plaintiff, before the money became recoverable by him. The money became payable to plaintiff by reason of a *subsequent* event.

4. Where the defendant, as the agent of A, sold certain goods entrusted to him by A; but the plaintiff obtained a decree against A for their wrongful conversion, and the defendant, as agent of A, retained the proceeds, which the plaintiff had an equitable right to follow in the defendant's hands. (Gurudas *v.* Ramnarain, I. L. R., 10 Calc., 860, P. C.) When the defendant sold the goods he was selling them as the agent of A, and he received the money for A and *not* for the plaintiff. Finding the proceeds of his goods in defendant's hands the plaintiff had merely an equitable claim to make the defendant responsible for the amount.

5. A suit for account and recovery of the money found to be due against a co-owner of property (where there was a resulting trust in favor of the plaintiff, and the defendant became liable to account to the plaintiff for his share). There being no express trust, and the suit not being brought for the purpose of following trust property, sec. 10 does not apply to the case. And the claim being only an equitable claim of the nature referred to in the case mentioned above, art. 62 is inapplicable. (Muhammad *v.* Safdar, I. L. R., 8 All., 25).

6. A suit for recovery of money paid in satisfaction of decrees for arrears of rent obtained in virtue of and dependent on a prior decree for enhancement of rent which was subsequently reversed. (Kalichurn *v.* Jogesh, 2 C. L. R., 354; Jogesh *v.* Kalichurn, I. L. R., 3 Calc., 30). Such a suit is in its nature one for *restitution*, or to be restored to the *status quo ante*, and is governed by art. 120. (Narayana *v.* Narayana, I. L. R., 13 Mad., 437, at pp. 441, 442).

When the money is received by the defendant.

Speaking irrespectively of art. 62, it may be said that the date of the actual receipt of money by the defendant is not necessarily the date on which "the money is received for the plaintiff's use." (See Syud Luft Ali *v.* Afzulunnissa, 16 W. R., P. C., 20; and p. 88, note, *supra*). Dr. Stokes, in his Anglo-Indian Codes, observes that the words "when the money is received," in the 3rd column of art. 62 should be read as "when the money is received for the plaintiff's use." See Atul *v.* Lyon, I. L. R., 14 Calc., 457, and Johuri *v.* Thakur, I. L. R., 5 Calc., 830. These cases, however, are, strictly speaking, cases under art. 97. And it has been held by the Privy Council that art. 62 does *not* apply when the money becomes recoverable by reason of an event occurring *subsequently* to the date of the actual receipt. (I. L. R., 10 Calc., 860; I. L. R., 19 Calc., 123). As to the construction of the words "received by the defendant for the plaintiff's

use," see also I. L. R., 19 Calc., p. 70, and Kalichurn *v.* Jogesh, 2 C. L. R., 354, 355. If when the money is actually received it is not received for the plaintiff's use, it would be safer to apply art. 120 (*ibid.*), or art. 97, if that be applicable. (I. L. R., 19 Calc., 123).

Art. 62 distinguished from arts. 87 and 97.

"Money" in this article does not include stocks. (See notes to art. 51). Under arts. 87 and 97 the money sued for must have been paid by the plaintiff. Under art. 62 the money must have been received by the defendant, and paid by the plaintiff or some one else. See p. 698, *supra*, as to another point of difference.]

Art. 63.	63.—For money payable for interest upon money due from the defendant to the plaintiff.	Three years ...	When the interest becomes due.

[No. 63. (No. 61, Act IX ; sec. 1, cl. 9, Act XIV).

Interest is money paid or allowed for the loan or use of some other sum of money. (See p. 317, note, *supra*). Interest which is recoverable as damages only does *not* become *due* under a contract, express or implied. It is assessed and awarded by the Court.

The principal amount may be recovered, though recovery of the interest for more than three years is barred by limitation (see 7 Ch. Div., 120) ; but no interest can be recovered if the suit for the principal amount is barred by limitation (see p. 340, *supra*, and Hajee Syud Mahomed *v.* Mussamut Ashruffoonnissa, I. L. R., 5 Calc., 759, 765).

Interest when a mere accessory, and when not.

It is only in *special* cases, *e.g.*, in cases where a particular term is stipulated for the repayment of the principal, and periodical terms for payment of interest that instalments of interest may be *separately* claimed apart from the principal. But, as a general rule, interest adheres to the principal, so that there is but one cause of action for both. (Branson's Digest of Unreported Bombay Judgments, 386). "I do not think that a man, who has a debt bearing interest, by suing for the interest, interferes with his right afterwards to sue for and recover the principal." (Per Blackburn, J., in Morgan *v.* Rowlands, L. R., 7 Q. B., 490, at p. 496). But in *ordinary* cases (where there is no express promise to pay interest independently of the principal) interest has always been deemed a mere *accessory* of the loan, and when the demand for principal is barred the accessory falls along with it. (Per Tindal, C. J., in Hollis *v.* Palmer, 2 Bing. N. C., at p. 716).

The cause of action under this article is a recurring one, and so long as the principal sum is not barred by limitation, successive actions for amounts of interest successively becoming due may be brought. A suit for a balance of money payable for interest is governed by this article. (Mokundi *v.* Balkishen, I. L. R., 3 All., 328).

Interest on mortgages.

With respect to arrears of interest on mortgages or other incumbrances, we have no provision corresponding to sec. 42 of the Statute 3 and 4, Will. IV, c. 27. It has accordingly been held that where both principal and interest are charged upon immoveable property, the period of limitation applicable to the recovery of the principal is applicable to the recovery of the interest. (See Gunput *v.* Adarji, I. L. R., 3 Bom., 312, 332 ; Davani *v.* Ratna, I. L. R., 6 Mad., 417 ; Baldeo *v.* Gokul, I. L. R., 1 All., 603, 605). Dr. Stokes, in his Anglo-Indian Codes, Vol. II, p. 993, says : "Article 63 was intended to comprise suits for arrears of interest due on money charged on land." But as the High Courts have held otherwise, he has suggested that the Legislature should *expressly* provide for such suits. (Vol. II, p. 950). See notes under arts. 132 and 147. In a suit instituted

in 1884 to redeem an usufructuary mortgage of 1833, the Bombay High Court held that the mortgagee was entitled to claim interest from the date of the mortgage up to the date of the decree. The law fixes no other limit as regards the calculation of the interest due to the mortgagee. (Daudbhai *v.* Daudbhai, I. L. R., 14 Bom., 113). See also I. L. R., 3 Mad., 125, and I. L. R., 12 Mad., 485. In a foreclosure suit (in respect of personality in England) it has been held that, in the absence of a specific rule of limitation (such as that contained in 3 and 4 Will., c. 27, sec. 42), redemption can only be allowed on payment of interest or of damages in lieu of interest, for the *whole* period before decree. (See Mellersh *v.* Brown, 45 Ch. D., 225). But as to interest by way of *damages*, see below Allahabad rulings followed by Pradhram *v.* Ahmed, 8 Cent. Prov. L. Rep., 95.

The last *six* years' arrears of interest are claimable if the bond on which the suit is brought is registered. (See Branson's Digest of Unreported Bombay Judgments, 224; Mansub Ali *v.* Golab, I. L. R., 10 All., 85). This cannot apply to interest payable by way of damages. (*Ibid.*, All.) Such *damages* (whether *called* interest or not) are nothing more than compensation for the non-payment of the principal on *the due date*, and cannot be awarded unless the suit in which they are claimed is brought *within* three or six years (under art. 115 or art. 116) from the date when the principal fell due, and the contract for the payment was *broken*. There can be no question of *annual* or *successive* breaches or recurring causes of action in suits for *such damages*. (See Bhagwant *v.* Daryao, I. L. R., 11 All., 416, 420; Gudri *v.* Bhubaneswari, I. L. R., 19 Calc., 19, at p. 25). Interest *post diem* by way of damages, after the due date, cannot be added in a decree for sale or foreclosure. (See Sri Niwas *v.* Udit, I. L. R., 13 All., 331; Gudri *v.* Bhubaneswari, I. L. R., 19 Calc., 19; Hurat Sing *v.* Baktwar Sing, 6 Cent. Prov. L. Rep., 22). Such damages are not a *charge* upon the property hypothecated or mortgaged, and art. 132 is inapplicable to claims in respect of them. (*Ibid.*) But see Ghose on Mortgages, p. 480, and 1 Mad. L. Journal, pp. 585, 586. In Bikramjit *v.* Durga, I. L. R., 21 Calc., 274, Trevelyan and Banerjee, JJ., without deciding any question of *limitation*, held that interest *post diem* on a mortgage is recoverable from the mortgaged property in the same way as the mortgage money and the costs of the suit.]

Interest by way of damages.

Recent Calc. decision.

64.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years ...	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.	Art. 64.

[No. 64. (No. 62, Act IX). Cf. art. 85.

An "account stated," as opposed to an open account, is an adjustment which is assented to by both the parties. (See Laljee *v.* Rughoo, I. L. R., 6 Calc., 447, 451). An account *closed* by the death of one of the parties, or otherwise, is *not* an account stated. (Angell, sec. 150).

Amendment of the law.

Under Act IX of 1871 the period of limitation in suits on accounts stated ran from the time "when the accounts were stated." Any verbal or unsigned statement of accounts (see Paluram *v.* Musst. Jankee, 1 Shome, 37; Tariney *v.* Shaik Abdur, 2 C. L. R., 346; Thakurya *v.* Sheo Sing, I. L. R., 2 All., 872) might, therefore, have enabled the creditor to evade the law relating to written acknowledgments of debts (see Hirada *v.* Gadiji, 6 Mad., 197, 201), unless the term "accounts stated" was restricted to an adjustment of cross-demands between the parties. But as in *common talk*, an admission of any debt due from the defendant to the plaintiff is treated as "an account stated," the Indian Legislature, in 1877, amended the provisions of Act IX of 1871, and enacted that an account stated must be in *writing signed* by the defendant or his agent, in order that art. 64 might apply to it.

Real accounts stated.

This article, as it stands, does not apply even to a *real* account stated unless it is in writing signed by the defendant or his agent. In a real account stated, a number of cross-demands are set off one against another, and a balance is struck in favor of one of the parties. In such a case, the law implies a new promise by the other party to pay the balance in consideration (not merely of past debts), but of the extinguishment of the old debts on each side. (See p. 283, *supra*). Even when such a statement is verbal or not signed by the defendant or his agent, the new promise is a new cause of action independently of sec. 19 or art. 64, and may be enforced within the period of three years under art. 115.

Inconsistency between sec. 19 and art. 64.

It may be here observed that in a real account stated, it is not necessary that the statement should be made within the period of limitation prescribed for the recovery of the several cross-items. (See Horgopal *v.* Abdul, 9 Bom., 429). Art. 64 itself does not prescribe any time within which an account must be stated. If, therefore, what is, in common talk, called an account stated, is an account stated within the meaning of art. 64, it is even now possible to evade, at least, one of the provisions of sec. 19, unless this article is read along with that section so as to make the article inapplicable except where, at the time of making the statement, all the several items of the account were unaffected by limitation. Art. 62 of Act IX of 1871 was read in this way by Jackson and Tottenham, JJ. (See Syud Mahomed Ali *v.* Mirza Dilwar Hossein, 2 Shome, 135. See also a ruling of a Full Bench of the Punjab Chief Court cited at p. 158 of Rivaz on Limitation, 3rd Ed.) The Bombay High Court has adopted another course. It gives distinct operation to, and obviates inconsistency between the two rules laid down in sec. 19, and art. 64, by restricting the latter to the adjustment and setting off cross-demands between the parties. (See Nahunibai *v.* Nathu Bhan, I. L. R., 7 Bom., 414; Tribhovan *v.* Amina, I. L. R., 9 Bom., 516). In Calcutta, however (see Dukhi Sahu *v.* Mahomed Bikhu, I. L. R., 10 Calc., 284, F. B.), all the learned Judges of the Full Bench assumed that art. 64 applied to accounts stated, even when there were no cross-demands, and the majority only held that the article did not apply if such statement of account was not "in writing" signed by the defendant or his agent. The Allahabad High Court also took a similar view of the matter in Zulfikar *v.* Munnalal, I. L. R., 3 All., 148, F. B. But in Jamun *v.* Nandlal, I. L. R., 15 All., 1, Mahmud and Blair, JJ., followed the Bombay rulings. According to Ayyar and Wilkinson, JJ. (see Amuthu *v.* Muthayya, I. L. R., 16 Mad., 339) an account stated is only a substantive cause of suit in itself when it is in writing signed by the defendant or his agent. These learned Judges appear to follow the remarks of Garth, C. J., in I. L. R., 10 Calc., 284, 296.

Rulings of the several High Courts.

The law on this subject may be summarized as follows :—

Accounts stated are of two kinds, to both of which the language of art. 64 applies, provided they are in writing, and signed by the defendant or his agent. According to the Bombay High Court, the article applies only to written and signed adjustments of cross-demands.

Fresh start in two cases.

An "account stated" in the wider sense (*i.e.*, as including both the kinds mentioned above) gives a fresh starting point, 1*st*, when it is in writing, and satisfies the other requirements of sec. 19 ; or 2*nd*, when it amounts to a new contract. (F. B., Punjab Chief Court). In the first case sec. 19 or art. 64 will apply. In the second case, either art. 64 or art. 115 will be applicable. For a third case see below.

Art. 64 or sec. 19 does not apply to a so-called account stated when such statement is oral, or written but not signed. Such statement cannot give a new start and thus save from the operation of limitation a suit for the balance, or for any of the items of the adjusted accounts. (See Thakuria *v.* Sheo, I. L. R., 2 All., 872, 874 ; Dukhi Sahu *v.* Mahomed Bhiku, I. L. R., 10 Calc., 284, 293). A so-called account stated, if written and signed under all the conditions mentioned in sec. 19, renews the period of limitation as provided in that section.

A third case not yet settled.

It has not yet been finally decided by all the High Courts, whether a so-called account stated, written and signed by the defendant, after some of the items of the account had been barred by limitation, would or would not save the barred items. Neither sec. 19, nor (according to the Bombay High Court) art. 64 applies to such a case. The language of art. 64 and the *dicta* of the Calcutta and Allahabad High Courts seem to favor the contention that time runs afresh from the date of such statement.

In the case of a so-called account stated, art. 115 will not help the plaintiff, even if it be conceded that here also the law raises the implication of a new contract in consideration only of a past debt, for such contract will be void under sec. 25 of the Contract Act, if the debt itself is barred by limitation, and the statement does not contain an express promise to pay, in writing, signed by the defendant or his agent. (See Ramjee *v.* Dharma, I. L. R., 6 Bom., 683 ; Syud Mahomed *v.* Mirza, 2 Shome, 135).

Real account stated and *signed.*

A real account stated, signed by the defendant or his agent, is governed by art. 64, whether, at the date of the statement, some of the items adjusted were barred by limitation or not.

If *not* signed.

A real account stated, if oral, or not in writing signed by the defendant or his agent, is nevertheless a valid new contract for the payment of the balance in consideration of the extinguishment of the old debts on each side, and such a contract, though not governed by art. 64, is governed by art. 115. Supposing some of the items of the cross-demands are barred debts, the verbal or unsigned statement of accounts would nevertheless give a new starting point of limitation. In some old cases, however, it was held that nothing short of a written acknowledgment would have the effect of creating or renewing any liability with reference to the law of limitation. (Doyle *v.* Alum, 4 W. R., S. C. Ref., 1 ; Ben. I. Co. *v.* Koylas, 10 W. R., 293).

Art. 64 applies if statement or agreement is *signed.*

The words in the first column of art. 64 must be read with those in the third column, and notwithstanding the ruling in the case of Sheikh Akbar *v.* Shekh Khan, (I. L. R., 7 Calc., 256), accounts stated verbally are not governed by art. 64. (See I. L. R., 10 Calc., 284, 287).

The simultaneous agreement, spoken of in the third column as giving a start later than the date of the accounts stated, must also

be in writing signed by the defendant or his agent. (See Dagdusa *v.* Shamad, I. L. R., 8 Bom., 542).

Is a *kistibundee* an account stated?

A *kistibundee* signed by the debtor to pay a debt by instalments has, in one case, been treated as an account stated in writing with a simultaneous agreement for payment at stated periods of time. (Bhekhan *v.* Rajrup, I. L. R., 8 Calc., 912). Supposing the *kistibundee* could be treated as a bond or promissory note, art. 74 would have been properly applicable to the case.

As to what are cross-demands, see the note to art. 85. A *khata* consisting of one item only on the debit side, and marked or signed by the debtor, is a mere acknowledgment, and not an account stated in the *true* sense of the term. (Tribhovan *v.* Amina, I. L. R., 9 Bom., 516).

Case of a *new obligation* to pay arising from a decree between the parties.

Money due on an account stated which would as such have been barred in three years from the statement, under art. 64, becomes, for purposes of limitation, a debt of another character, when having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of the latter's land, that arrangement failed, the sale not being specifically enforceable, and so declared by a decree in a suit for specific performance by the debtor against the creditor. Although there is no written acknowledgment of liability signed by the debtor under sec. 19, the decree brings about a new state of things, and imposes a new obligation on the debtor, who can no longer allege that he is absolved by the creditor being entitled to the land instead of the money. (Bassu Kuar *v.* Dhumsingh, I. L. R., 11 All., 47, P. C.) In this case as the creditor disputed some of the other terms of the arrangement, he might possibly have sued for his debt on an earlier date, but he could not have recovered the money until the debtor's suit for specific performance was finally decided. But the law would not compel a man to institute a perfectly vain litigation under peril of losing his property if he did not. Art. 97 was applied to the creditor's suit, the failure of consideration dating from the date of the decree.]

Art. 65.	65.—For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years ...	When the time specified arrives or the contingency happens.

[No. 65. (No. 63, Act IX).

This is a general article for the recovery of either liquidated sums, or unascertained damages, for the breach of a promise to do anything at a specified time, or upon the happening of a specified contingency. A suit for breach of promise of marriage or for non-delivery of goods bailed may come under this article. Where the promise is not to do anything but to abstain from doing something, or where no fixed time or event is specified for the performance of the contract, art. 115 or some other article will apply.

If the promise is contained in a duly registered agreement, art. 116 will apply. (Kishenlall *v.* Kinlock, I. L. R., 3 All., 712). A suit to recover money deposited under an unregistered agreement that it shall be payable on the happening of a specified contingency does not fall within art. 60, but is governed by art. 65 or 62. (See Johuri *v.* Thakoor, I. L. R., 5 Calc., 830).

For the meaning of the word compensation in actions *ex-contractu*, as used in this schedule, see the notes to art. 116.

Where A, as surety of B, promises that "if B does not pay eventually (*shesh parjanta*), I will," limitation does not run in favor of A until the creditor demands compensation from A on B's failure to pay. (Bishumber *v.* Hungshesher, 4 C. L. R., 34). A case like this does not fall within art. 83, unless the date of A's refusal to pay is the date when the plaintiff is "actually damnified."

A debtor's promise to pay, when he shall have the means to do so, may be enforced within three years from the date of his acquiring means to pay. If a person who has promised to do anything at a future specified time, declares beforehand that he will not do it, this article does not prohibit a suit being brought against him before the time specified arrives. (See 1 Mad., 162). Promise to pay when able.

Dr. Stokes (Anglo-Indian Codes, Vol. II, pp. 950, 951) suggests that art. 65 should be omitted, and suits on guarantees specially provided for. He refers to Colvin *v.* Buckle (8 M. and W., 680), which was a suit on a guarantee given by the defendant to the plaintiffs to reimburse them the amount of money advanced by the plaintiffs to a third party at the request of the defendant, in case the plaintiffs should find it necessary to call upon the defendant. It was held that the cause of action against the surety accrued as soon as all the facts were ascertained on which the plaintiff might and ought to have called upon the defendant to pay. See notes to arts. 81 and 83. Suits on guarantees.

A suit barred as against the principal debtor is not necessarily barred as against the surety. (Kristo *v.* Radha, I. L. R., 12 Calc., 330). But cf. Bhup Singh *v.* Zoinul, I. L. R., 9 All., 205, 210. The Contract Act is not explicit on this point. See secs. 134—137.]

66.—On a single bond where a day is specified for payment.	Three years ...	The day so specified.	Art. 66.

[No. 66. (No. 65, Act IX). A single bond is a written engagement for the payment of money without a penalty. (I. L. R., 4 All., 3, 6). There are no alternative conditions in a single bond. (Thomson). Instalment-bonds are provided for in arts. 74 and 75. An ordinary *tamasuk*, it is apprehended, is a single bond, as well as a promissory note as defined in sec. 3. But as "promissory notes" and "bills of exchange" are spoken of together, as distinct from "bonds," in arts. 69, 72, 73, 80, &c., it may be doubted if a *tamasuk*, which is not negotiable, is a "promissory note" within the meaning of those articles. A bond which besides creating a money obligation gives the creditor, on default, the right of treating the transaction as a conditional sale of certain properties, is not a single bond. (Lachman *v.* Kesri, I. L. R., 4 All., 3). *Tamasuks.*

Where the debt is payable "within two years from the date of the bond," the time at which it must be repaid is specified within the meaning of this article. (See Ball *v.* Stowell, I. L. R., 2 All., 322, 331; Narain *v.* Gouri, I. L. R., 5 Calc., 21). So where a mortgage-deed stipulated that the mortgagor would pay the debt within ten years and redeem the mortgaged property, it was held that the word "within" was not a sufficient indication of the intention of the parties that the mortgagor might redeem in a *less* period than ten years. (Vadju *v.* Vadju, I. L. R., 5 Bom., 22). "*Within* two years."

A bond payable at a specified date, with a condition that on default of payment of *interest* at stated periods the creditor might immediately realize the whole amount due, is, according to some authorities, governed by this article. (Narain *v.* Gourie, I. L. R., 5 Calc., 21; Ball *v.* Stowell, I. L. R., 2 All., 322). But see art. 80.

If the day specified is the 30th Pous of a particular year, and it turns out that Pous of that year contains only 29 days, limitation runs not from the 29th Pous, but from the day following. (Almas *v.* Mahomed Raja, I. L. R., 6 Calc., 239).

To a suit on a so-called mortgage bond which does not create a charge or lien on any *specific* immoveable property, neither art. 132, nor art. 147 will apply. A suit on such a bond is governed by art. 66. (Collector *v.* Beti, I. L. R., 14 All., 162).

A suit on a *registered* bond is governed by art. 116.]

Art. 67.	67.—On a single bond where no such day is specified.	Three years ...	The date of executing the bond.

[No. 67. (No. 66, Act IX). See the notes to art. 66.

The starting point of limitation in this case is fixed on the same principle as in art. 57.

It has been held that a bond payable on demand does not specify the date of payment and is governed by this article (Rupkishore *v.* Mohni, I. L. R., 3 All., 415). Art. 80 will, at all events, apply to such a case. Art. 73 deals with bills and notes payable on demand.]

Art. 68.	68.—On a bond subject to a condition.	Three years ...	When the condition is broken.

[No. 68. (No. 67, Act IX).

This article should be read with sec. 3, which lays down that bond "includes any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void, if a specified act is performed or is not performed, as the case may be." There is some difference of opinion as to the meaning of these words. (See Reference by Board, I. L. R., 2 All., 654, F. B., and Gisborne *v.* Subal, I. L. R., 8 Calc., 284). A covenant with a penal clause is not a bond conditioned for the performance of a covenant. (I. L. R., 8 Calc., 284). A bond containing a penalty is called an "obligation" in English law. (Wharton). It should be remembered that sec. 3 does not give an exhaustive definition of "bonds."

Post-obit bonds. In the case of a post-obit bond, the condition of the bond is not broken until the death occurs, upon which the money becomes payable. In an action for the penalty against a subordinate officer on his bond, to account at the end of his service, limitation does not run until the service ends.]

Art. 69.	69.—On a bill of exchange or promissory note payable at a fixed time after date.	Three years ...	When the bill or note falls due.

[No. 69. (No. 68, Act IX).

A promissory note or a bill of exchange is not necessarily negotiable. It may or may not be made payable to order or to the bearer; but it is rarely made payable only to a particular person named therein. (See sec. 3, and Wharton's Law Lexicon).

The maturity of a promissory note or bill of exchange is the date at which it falls due. Where the bill or note is not expressed to be payable on demand, it falls due on the third day after the day on which it is expressed to be payable. For the rules regarding the maturity of negotiable instruments, see secs. 22—25, Act XXVI of

1881. For purposes of limitation under Act XV a bill payable at sight is not treated as a bill payable on demand. Bills payable after sight, as well as bills payable at sight, are governed by art. 70. Bills of exchange.

This article supposes that the bill has been accepted by the drawee, for if the bill has been dishonored by non-acceptance, art. 78 applies.

For forms of plaints in suits on bills and notes see Nos. 29—48, Schedule IV, Act XIV of 1882.

"Payable one month after date," or "payable seven days after date" mean "payable one month or seven days from date." The day of the date is excluded in the computation. (See notes at pp. 207, 208, 239, 240, 254 and 585, *supra*).]

70.—On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years ...	When the bill is presented.	Art. 70.

[No. 70. (No. 69, Act IX). See notes to art. 69.

A bill payable "at a fixed time after sight" is governed by art. 72. The expressions "after date" and "after sight" are not synonymous. As to presentment see secs. 61—76, Act XXVI of 1881.

Sec. 21 of Act XXVI of 1881 enacts: "The expression 'after sight,' in a bill of exchange, means after acceptance, or noting for non-acceptance, or protest for non-acceptance."

A promissory note payable at sight or after sight would come under art. 80.]

71.—On a bill of exchange accepted payable at a particular place.	Three years ...	When the bill is presented at that place.	Art. 71.

[No. 71. (No. 70, Act IX). A promissory note made (in the body of it) payable at a particular place is governed by art. 80.]

72.—On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years ...	When the fixed time expires.	Art. 72. Bills and notes.

[No. 72. (No. 71, Act IX).

The entries in the third column of arts. 69, 70, 72, 73, 76, 77, 79, 81, 82 and 83 appear to be based on the English cases referred to by Messrs. Darby and Bosanquet at pp. 19 to 23 of their work on Limitation.

In a suit on a promissory note payable one year after demand, time does not commence to run until after the expiry of one year from the date when a demand is *actually* made. (See Thorpe *v.* Booth; Banning, 27; pp. 95, 224, *supra*). As to the construction of the words "payable after six months whenever the payee shall demand the money," see Jeannissa *v.* Manikji, 7 Bom., 36. It was held in this case (under Act XIV of 1859) that limitation commenced to run upon the expiry of six months from the date of the note. Such a case does not come under either art. 72 or 73. Art. 80 applies to the case.]

73.—On a bill of exchange or promissory note payable on	Three years ...	The date of the bill or note.	Art. 73.

demand and not accompanied by any writing restraining or postponing the right to sue.

[No. 73. (No. 72, Act IX).

The starting point of limitation in this case is fixed on the same principle as in art. 59. Time runs from the date of the bill or note, not from the date of acceptance of the bill, or any other date. See notes to art. 59. "Payable at any time within six years on demand" is not equivalent to "payable on demand." A promissory note so payable is virtually a note payable on demand, accompanied by a writing restraining the right to sue, inasmuch as the terms of the note restrain the suit unless demand is made within six years. It has been held in one case that this special form of note is not provided for by art. 73, and that it falls within art. 120. (Sanjini *v.* Rama, I. L. R., 6 Mad., 290). It had not, however, been suggested in this case that art. 80 (the general article for suits on bills, notes and bonds) might have applied to it. (See Stokes' Anglo-Indian Codes, Vol. II, p. 986). The Madras High Court has in a recent case applied art. 80 to a suit on a bond of a special form. (See notes to art. 80 and 3 Mad. L. J., 199). For another peculiar form of promissory notes see notes to art. 72.

Special forms of notes and bills.

Cheques.

As to bonds payable on demand see arts. 67 and 80. Cheques come under art. 73.

Under this article the contemporaneous agreement restraining or postponing the right to sue must be in writing. (Compare Royal Bank *v.* Harmasji, 3 Bom., O. C. J., 153).

Bank notes.

Currency notes and Bank notes (though) payable to the bearer (on demand) are not expected to be paid until given up by the holder; and according to an American case, they are not affected by the law of limitation. (See Banning, 278, and notes to art. 80).

Substituted new contract.

A new contract may be substituted for that contained in a promissory note payable on demand, and a suit on the basis of such a contract will not be barred simply because three years have elapsed from the date of the note. (See Natha *v.* Janardhan, I. L. R., 1 Bom., 503). In this case the plaintiff, in consideration of a payment of interest in advance up to a certain date, agreed to forbear to demand or sue for the principal until that date. Limitation was held to run from that date.

As to the former state of the law relating to bills and notes payable on demand, see pp. 223 and 224, *supra*.

Art. 74.	74.—On a promissory note or bond payable by instalments.	Three years ...	The expiration of the first term of payment, as to the part then payable; and for the other parts the expiration of the respective terms of payment.

[No. 74. (No. 74, Act IX).

This article furnishes an instance of a contract where there are successive breaches. (See p. 222, *supra*). Successive breaches of a contract to pay an annuity, and of other contracts, written or verbal, are provided for by art. 115. An instalment bond which provides that if default be made in the payment of any instalment, the *whole* shall be

due at once does not come under art. 74, unless the benefit of the provision is duly waived and the suit is brought on the original instalment arrangement. Where there has been waiver of the provision in respect of defaults, and the suit is brought, not for the whole amount of the bond, but only for the instalments which have fallen due, art. 74 applies. See notes to art. 75.

If the note or bond is *registered*, art. 116 applies to the case. (Din Doyal *v.* Gopal, I. L. R., 18 Calc. 506).]

75.—On a promissory note or bond payable by instalments which provides that, if default be made in payment of one instalment, the whole shall be due.	Three years ...	When the first default is made, unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.	Art. 75

[No. 75. (No. 75, Act IX).

The provision, not a *penalty*.

A provision in a note or bond for the immediate payment of the whole, on any default in the payment of an instalment, is often spoken of as a penalty or a condition of forfeiture, but it has been held in equity that a debt being presently due, such a stipulation is not in the nature of a penalty, in as much as its object is only to secure payment in a particular manner. The Courts cannot relieve the debtor against the consequences of a default in the punctual payment of any instalment, or compel the creditor to waive the default. (Sterne *v.* Beck, 32 L. J. Ch., 682; Ragho *v.* Dipchand, I. L. R., 4 Bom., 96).

Suit for *whole* or *part*.

"The whole."—The *whole* amount of the bond or of the residue if some of the instalments have been paid. Where there has been a *waiver* in respect of a default in the payment of any instalment and a suit is afterwards brought not for "the whole" but only for the instalment which has fallen due, art. 74 may apply. Art. 75 need not be applied to such a case. (Cf. Gulabsa *v.* Amra, 6 Cent. Prov. L. R., 24). Where there has been *no waiver* in respect of any default, a suit either for "the whole" or for those instalments only which have already fallen due under the original instalment arrangement, is barred after three years from the first default under art. 75. (See Nobodip *v.* Ramkrishna, I. L. R., 14 Calc., 397). If there has been no waiver, even a suit for a *part* (or for the *instalments* which have fallen due) must be brought within three years of the first default. See Gopal *v.* Poramma, I. L. R., 7 Mad., 583.

Principle of column 3 applied to some *other* cases.

In Juggut Mohinee *v.* Monohor, 25 W. R., 278, Mitter, J., suggested that the *principle* of the rule as to the starting point of limitation laid down in the third column of art. 75 might be applicable to instalment bonds hypothecating immoveable property, and the Calcutta High Court has in several cases applied the provisions of that rule (including what relates to *waiver*) to applications for the execution of instalment *decrees*. (See below).

Cases to which the language of this article does not apply.

On the other hand, it has been held that a *verbal* agreement for the payment of money by instalments with a similar condition as to the whole amount becoming due (not being a promissory note or bond) is not governed by this article. (Koylas *v.* Boykoonto, I. L. R., 3 Calc., 619). It may also be said that, strictly speaking,

this article does not apply if the whole amount becomes due on default in payment of two or more successive instalments, or on default made in the payment of any instalment and on that instalment remaining unpaid for six months or any other period. But as regards the first of the two cases, it has been held that art. 75 does apply to the case of a failure to pay *several* instalments, causing the whole to become due, as well as to the case of a failure to pay *one* instalment having that effect. (Branson's Digest of Unreported Judgments of the Bombay Court, p. 216; Navalmal *v.* Dhondiba, 11 Bom., 155). The principle of these rulings has been adopted in the Central Provinces. (Gulabsa *v.* Amra, 6 Cent. Prov. L. R., 24).

Instalment of *interest*.

It has been held that a condition that on default of payment of one instalment of *interest* the principal amount shall become due, does not fall within this article. (Ball *v.* Stowell, I. L. R., 2 All., 322; Narain *v.* Gouri, I. L. R., 5 Calc., 21). But the same or nearly the same result will be arrived at by the application of art. 65, art. 115, or art. 80 to cases to which this article does not, strictly speaking, apply. The only difference will be as to the effect of a *waiver* of the benefit of the condition. Even this difference, it seems, does not, according to the Calcutta High Court, exist in the case of instalment *decrees* to which the language of art. 75 does not and cannot apply.

Law before Act of 1871.

Under the law, as it stood before Act IX of 1871 came into operation, if the debtor defaulted in the punctual payment of any instalment, the benefit of the provision could not be waived, so as to give the creditor an alternative right to sue for the several instalments as they successively fell due. (Ragho *v.* Dipchand, I. L. R., 4 Bom., 96, at p. 99). No doubt the creditor might choose to wait, or to forbear from suing till all or some of the succeeding instalments fell due, but such forbearance did *not* affect the operation of limitation which commenced to run from the time of the *first default*. (Hanmantram *v.* Arthur Bowles, I. L. R., 8 Bom., 561, at p. 567). The question of *limitation* (in the absence of an express provision like that contained in the 3rd column of schedule II, art. 75, Acts IX and XV) could *not* be left to the *option* of the creditor of suing for the whole amount at once, or of waiving the default. (*Ibid.* See also Asmuttullah *v.* Kally, I. L. R., 9 Calc., 56, at p. 58; Gumna *v.* Bhiku, I. L. R., 1 Bom., 125, at p. 130; Hurri *v.* Nasib, I. L. R., 21 Calc., 542, at p. 547). No *stipulation* between the parties reserving an *option* to the obligee as to bringing a suit for money *due* can exclude the operation of the provisions of the Limitation Act as to the time from which limitation is to be reckoned. (Khairuddin *v.* Atu Mul, Punjab Record, No. 188 of 1883; Rivaz, pp. 165, 166). See also Hemp *v.* Garland, 4 Q. B., 519. A waiver made *before* the *express* provisions of Act IX of 1871 came into operation, could not affect even suits instituted *after* that date. (See Ahmed *v.* Hafiza, I. L. R., 3 All., 514).

Creditor's option does not affect limitation.

Effect of waiver in the *absence* of *express* provision.

Except under the *express* provisions of art. 75 (Act IX and Act XV), *waiver* not amounting to a fresh agreement superseding or suspending the original agreement between the parties can *not* affect the running of time when once it has commenced to run. (See Gumma *v.* Bhiku, I. L. R., 1 Bom., 125; Ahmad *v.* Hafiza, I. L. R., 3 All., 514; Raghu *v.* Dipchand, I. L. R., 4 Bom., 66, 68). Before Act IX of 1871 came into operation, it was further held that if the suit was brought, not upon any such fresh agreement, but upon the original bond itself, the mere proof of payment and acceptance of an instalment subsequently to the default could not help the plaintiff in any way. (Hurronath *v.* Mahiroollah, 7 W. R., 21, F. B.; Gumma *v.* Bhiku, I. L. R., 1 Bom., 125, F. B.) But under art. 75, if a waiver is proved, such waiver will stop the running of time, and a fresh default will give

Otherwise under art. 75.

the creditor a fresh start, although the suit is based on the original note or bond itself.

What does not amount to *waiver*.

Mere abstinence from suing for the whole amount due does not amount to *waiver* even within the meaning of this article. (Sethu *v.* Nayana, I. L. R., 7 Mad., 577; Gopala *v.* Poramma, I. L. R., 7 Mad., 583). A subsequent acceptance of the instalment in arrear may operate as a waiver, but merely allowing the default to pass unnoticed does not. (Chenibash *v.* Kadum, I. L. R., 5 Calc., 97). Simply allowing the matter to sleep is no evidence of waiver. (Nobodip *v.* Ramkishen, I. L. R., 14 Calc., 397). Acceptance of payments made in reduction of the *whole* debt, and not on account of the *particular* instalment due, cannot, of course, amount to a waiver. (Sri Rajah *v.* Sri Rajah, I. L. R., 3 Mad., 61, at p. 64; Mumford *v.* Peal, I. L. R., 2 All., 857. See also the reporter's note to Gumma *v.* Bhiku, I. L. R., 1 Bom., 125). But such payments *may* give a new start if sec. 20 be applicable.

What amounts to waiver.

According to West and Haridas, JJ., the mere payment and receipt of even an overdue instalment does not constitute a waiver of the right to sue. (Branson's Digest of Unreported Bombay Judgments, p. 216). In Mumford *v.* Peal, the Allahabad High Court say that to prove waiver under art. 75, it is necessary to prove that the creditor has entered into some fresh parol arrangement, condoning the breach and creating new relations with the party in default. (I. L. R., 2 All., 857). A waiver must be an intentional act with knowledge; and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both parties understood the terms of the substituted arrangement. (Earl of Darnley *v.* London Co., 36 L. J., Eq., 404, cited by Straight, J., in Mumford *v.* Peal, I. L. R., 2 All., 857). According to the Madras High Court the subsequent *acceptance* of the amount of the *particular* instalment in respect of which there has been a default, *together* with circumstances indicating an *intention* to waive the forfeiture, amounts to a waiver. (Nagappa *v.* Ismail, I. L. R., 12 Mad., 192, 195). But the fact of refraining from enforcing the condition on default, coupled with the acceptance of subsequent instalments as though no default had taken place, must, in the absence of proof to the contrary, be ascribed to intentional waiver of the creditors' right, and must be taken to have been so understood by the party in default. (Per Oldfield, J., in Radha Prosad *v.* Bhogwan, I. L. R., 5 All., 289, at p. 292). It has been held by Wilson and O'Kinealy, JJ., that the right to enforce payment of the *whole* sum due, upon default being made in the payment of an instalment, may be waived by subsequent *payment of the overdue instalment* on the one hand, and *receipt* on the other. (Monmohun *v.* Durga Churn, I. L. R., 15 Calc., 502). This ruling has been followed in the Central Provinces in preference to the ruling in I. L. R., 2 All., 857. (See Rao Bahadur Mukund *v.* Narayen, 4 Cent. Prov. L. R., 21). See also Hurri *v.* Nasib, I. L. R., 21 Calc., 542. The question whether the right was waived or not is a question of fact. If the creditor accepted the subsequent payment on account of the *whole* residue then due by reason of the default, such acceptance will not amount to a waiver of the right to enforce the condition. But in the absence of circumstances to show that the abstinence from suing for the whole, and the acceptance of subsequent payments were not the result of an intentional waiver, the creditor will be presumed to have waived his right. (Sri Rajah *v.* Sri Rajah, I. L. R., 3 Mad., 61). But no *presumption* of waiver will be made when the subsequent payments do not correspond with the amount of any overdue instalment. (See Punjab Rec., No. 188 of 1883, cited by Mr.

Rivaz in his notes under art. 75). Claiming the *whole* amount before the last instalment falls due is an affirmative act showing that the benefit of the provision has *not been waived.* (Bir Narain *v.* Darpa Narain, I. L. R., 20 Calc., 74, at p. 78).

Principal and surety.

Receipt of subsequent instalments from the principal debtor does not necessarily operate as waiver, so far as the *surety* is concerned. (Mumford *v.* Peal, I. L. R., 2 All., 869; Breen *v.* Balfour, Bourke, O. C., 120).

When and how often may option of waiver be exercised under art. 75.

The omission to enforce the condition on one default does not prejudice the right to enforce the condition on a subsequent default. (Darby and Bosanquet, 251). There may be a waiver by the creditor not only of the first default, but of any subsequent default except the last. Column 3 of this article *expressly* provides for repeated waivers. (I. L. R., 3 Mad., 61, at pp. 64, 65). The corresponding provisions of Act IX of 1871 also were *construed* to cover repeated waivers. (See I. L. R., 3 Mad., 61). There can be no waiver after the last instalment falls due for the obvious reason that then there are no two obligations to elect between. (Mackenzie *v.* Tiruvenza, I. L. R., 9 Mad., 271). If the creditor does not waive, but elects to enforce the condition, he can do so but once. Having once resorted to the alternative provision, he cannot revert to an enforcement of the instalments. (*Ibid.*; Radha Prosad *v.* Bhagwan, I. L. R., 5 All., 289, at p. 293). When the creditor in his application or plaint claims to realize the *whole* amount, he does an affirmative act showing that he did *not waive* the benefit of the provision. (Bir Narain *v.* Darpa Narain, I. L. R., 20 Cal., 74, at p. 78). And in such a case there being no question of waiver, the creditor cannot recover even the later instalments if the three years have already elapsed from the date of the first default. (*Ibid.*)

The provision in case of *waiver* applies where instalment arrangement is *not* cancelled by a default.

The latter portion of the third column of art. 75 supposes that the agreement for payment by instalments does *not* become absolutely void or cancelled, on default in payment of one instalment; for, when such agreement is cancelled and at an end, the only obligation that remains is the obligation to pay the whole amount at once. There can be no election in such a case. The creditor has no other alternative than to enforce the only subsisting obligation. If he waives the benefit of such a provision, he foregoes his claim altogether. (See Darby and Bosanquet, 251; I. L. R., 9 Mad., 271, at p. 272; Judhistir *v.* Nobin, I. L. R., 13 Calc., 73). Art. 75 cannot apply where the bond provides that on the occurrence of a default the agreement to pay by instalments shall be *absolutely void.*

Where it *is* cancelled.

It may be argued that it is not allowable to the debtor to take advantage of his own default, and to say that the agreement is cancelled for his own benefit. (See Banning, p. 148). But it should be remembered that it is the duty of the Court in British India to dismiss a suit if it is really barred by limitation. (See sec. 4). If the Court finds that there has been no intentional waiver, because the case does not admit of a waiver, the period of limitation will run from the date of the first default. It has been held that where the terms of the security distinctly provide that upon failure to pay any one instalment, the agreement for payment by instalments shall be cancelled, the creditor has no option to waive his right to realize the whole amount at once, and that if he neglects to take advantage of the special provision in his favor, he may be too late to realize anything. (I. L. R., 13 Calc., 73). Where a decree simply provides that "in the event of default the decree shall be executed for the whole amount," the decree-holder,

it has been held, is bound to execute it in one lump. If, after the instalment arrangement has ceased, the decree-holder chooses to continue to receive instalments, he does so at his own risk. (Shibdul *v.* Kalka Prosad, I. L. R., 2 All., 443. See also I. L. R., 16 All., 371). But the words "the whole sum or amount shall immediately fall due or become recoverable" do not necessarily cancel the instalment arrangement. (See I. L. R., 14 Calc., 352; I. L. R., 15 Calc., 502).

Whether terms give *option* or not, creditor's waiver under art. 75 interrupts limitation.

The *terms* of a note or bond may or may not give the creditor the *option* of enforcing payment of the whole debt on the occurrence of a default, or of waiving such right, and accepting payment by instalments. (Navalmal *v.* Dhondiba, 11 Bom., 155; Narain *v.* Gouri, I. L. R., 5 Calc., 21; Koylas *v.* Boykoonto, I. L. R., 3 Calc., 619). Even where the *terms* of a note or bond leave the creditor (on the happening of a default) *no option*, but to enforce payment of the whole amount, the benefit of the provision may be waived. And a waiver even in such a case does (under the *express* rule laid down in art. 75) stop the running of time. The creditor may in case of such waiver allow the note or bond to run on as before and leave the remaining instalments to be paid as they successively fall due, without incurring the liability of being barred by the lapse of three years from the date of the default so waived. He gets a fresh start under the express enactment of art. 75. The language of art. 75 applies only where, on the occurrence of a default, "the whole *shall* be due." It may, perhaps, be contended that art. 75 is inapplicable where the creditor (is not *bound* to sue for the whole amount on the occurrence of a default, but) has an *option*, and the whole amount *may* be sued for, if he *so chooses*. But the words "the whole *shall* be due' have often been applied to cases where the creditor has the *power* to recover the whole. Where the bond provided that the creditor "shall be *at liberty* to recover the whole amount on the occurrence of any default," a Full Bench of the Judges of the Punjab Chief Court held that art. 75 applied to the case. (Punjab Rec., No. 188 of 1883; Rivaz, 3rd Ed., p. 166). See also Hemp *v.* Garland, 4 Q. B., 519, and Reeves *v.* Butcher, 1891, 2 Q. B., 509, at pp. 510, 511.

Instalment decrees.

The provisions of art. 75 are, apparently, not applicable to an *application* for the execution of an instalment *decree* with a proviso to the effect that on default being made in payment of any of the instalments, the decree-holder is entitled to execute the decree for the whole amount due. Even the *principle* of these provisions, which give to *waiver* the effect of interrupting the running of limitation, is, according to some of the cases, inapplicable to instalment *decrees*. (See I. L. R., 2 Bom., 356, and I. L. R., 2 All., 443). The current of decisions in the Calcutta High Court is, however, to a contrary effect. (I. L. R., 14 Calc., 352; I. L. R., 15 Calc., 503). And it has been recently held by the Chief Justice of the Allahabad High Court that where, by the *terms* of the instalment decree, it is *optional* with the creditor to enforce payment of the *whole* decree on the occurrence of a default in the payment of any instalment, *waiver* of a default will affect the running of time, and limitation will not run from the date of the default in respect of which there has been a waiver. (I. L. R., 16 All., 371). According to Petheram, C. J., and Cunningham, J., the precise wording of a decree is not very material; the proviso that the whole sum shall become due is put in for the benefit of the creditor alone, and he can always waive it (by accepting payment of the overdue instalment) if he thinks fit to do so. (Ram Culpe *v.* Ram Chunder, I. L. R., 14 Calc., 352). According to Ghose and Rampini, JJ. (Hurri *v.* Nasib, I. L. R., 21 Calc., 539), no distinction

Where terms give creditor an option.

"Shall be due" and "may be sued for."

can be drawn between a case in which it is provided that on non-payment of an instalment the whole amount *shall become due*, and one in which it is provided that on non-payment of an instalment the whole amount *may be sued* for. There is no reason why limitation should begin to run from the first default in the one case and not in the other. But Edge, C. J., and Blair, J., consider the precise wording of a decree to be material. If the terms of the decree show that the intention is that on a default the decree *shall* be executed in full, and there is nothing to shew that the judgment-creditor has an *option* in the matter, time begins to run from the happening of a default. But where, under the *terms* of the decree, the judgment-creditor has an option and *may allow* the decree to run on as if no default has occurred, limitation will run against him in respect of each instalment separately from the time when such instalment may become due. (Shanker *v.* Jalpa, I. L. R., 16 All., 371). But in the *absence* of an express provision like that contained in the third column of art. 75, the law of limitation would control the creditor's option or right to elect. (See Ball *v.* Stowell, I. L. R., 2 All., 322, at p. 333). In the absence of an express provision, waiver cannot stop the running of time if it has once commenced to run. (Gumna *v.* Bhiku, I. L. R., 1 Bom., 125, F. B.) In Hemp *v.* Garland, 4 Q. B., 519, where the terms of the instrument *expressly* provided that the creditor should be *at liberty* to enter up judgment for so much of the debt as should be unpaid at the time of the first default as if *all* the periods of payment had expired, Lord Denman, C. J., said: "If he, the plaintiff, chose to wait till all the instalments became due, no doubt he might do so, but what was *optional* on the part of the plaintiff would not affect the right of the defendant who might well consider the action as accruing from the time the plaintiff had a *right* to maintain it." (I. L. R., 8 Bom., 561, 567). As the plaintiff *might* have sued on the first default for the *whole* amount remaining unpaid, it was held that the Statute was a bar to an action on *any* of the instalments. (Buswell, p. 267).

Under the *general* law waiver cannot stop the operation of limitation.

Hemp *v.* Garland is good law.

Mr. Banning observes that Hemp *v.* Garland is at variance with the well-known rule that no one is obliged to take advantage of a forfeiture. And the decision of Petheram, C. J., and Cunningham, J., in I. L. R., 14 Calc., 352, appears to be based on this rule of English law. In an English Case in 1891, where the agreement itself provided that it should be *lawful* for the plaintiff to call in the whole amount at once, if default was made in payment of any instalment, it was argued for the plaintiff that he was not *bound* to call in the amount on the occurrence of a default, that as no one was bound to take advantage of a forfeiture, he was not bound to exercise the *option* which he had under the agreement, and that Hemp *v.* Garland ought to be overruled. But the Court of Appeal (Lords Justices Lindley, Fry and Lopez) held that Hemp *v.* Garland was good law, and that "the statute runs from the *earliest* time at which an action *could* be brought." (Reeves *v.* Butcher, 1891, 2 Q. B., 509, at p. 511). The correctness of this ruling was again admitted by Counsel on both sides in a recent case before the Lord Chancellor. (See Barker's claim, 1894, 3 Ch., 290, at p. 292). The rule that no one is obliged to take advantage of a forfeiture is old English law, and so far as the running of time in respect of certain interests in real property is concerned, is preserved by sec. 4 of 3 and 4 Will. IV, c. 27. In India we have no general rule which might affect the operation of limitation in cases of waiver of forfeitures, and as the ruling in Hemp *v.* Garland has been acted upon in two Full Bench Cases of the Calcutta and Bombay High Courts (see 7 W. R., 21, and I. L. R., 1 Bom., 125)

that ruling, it is apprehended, is applicable to all cases to which the express provision as to waiver in art. 75 does not extend.

Under this article plaintiff must prove waiver.

It has been held that under art. 75, even in the case of an express optional clause in the instrument, the creditor must show that he exercised his right of waiver; he must show that he elected to forego his right to claim the whole amount at once. (Navalwal *v.* Dhondiba, 11 Bom., 155, at p. 159; Gopala *v.* Paramana, I. L. R., 7 Mad., 583). Laches and waiver are not convertible terms. (I. L. R., 5 Calc., 97, at p. 99). Art. 75 clearly shows that forbearance to sue, *per se*, does not amount to a waiver; for the right to sue, arising out of a default, co-exists with forbearance to sue for at least three years. (I. L. R., 2 All., at p. 325).

Case where mere forbearance amounts to waiver.

Where the language of the bond showed that it was the intention of the parties that, in case of default made in payment of one instalment, the whole amount should become due, only if demand for such amount were made, it was held that time did not commence to run against the creditor until he made a demand for payment of the entire sum. The words used were "the whole shall be paid if so required by the creditor." The mere forbearance to make a demand amounted to a waiver in this case. (Hanmantram *v.* Bowles, I. L. R., 8 Bom., 561). Strictly speaking, the right of the creditor in this case to *sue* for the whole amount did not come into existence at all, and such right could not possibly have been waived by him. All that the creditor waived was the preliminary right to *demand* payment of the whole amount.

Does the provision as to *waiver* apply to execution cases.

The provisions of art. 75 as to waiver do not apply to applications for the execution of decrees under which money is payable by instalments, and it is provided that the whole amount shall be realizable if the debtor makes default in payment of one instalment. There is no provision for waiver in cl. 6, art. 179, and even the acceptance of payments made subsequently to default would not, according to the Bombay and the Allahabad High Courts, affect the question of limitation. (Dulsook *v.* Chugon, I. L. R., 2 Bom., 356; Shib *v.* Kolka, I. L. R., 2 All., 443; Ugranath *v.* Laganmani, I. L. R., 4 All. 83).

There are, however, some rulings or dicta to the effect that the judgment-creditor may at his option realize the several instalments within three years of their falling due, notwithstanding the fact that the debtor has defaulted in paying one instalment at the time fixed by the decree; that the special provision for the immediate payment of the whole amount is only for the protection and benefit of the creditor, that he may choose to put it out of the way even as regards the running of limitation; and that if the judgment-creditor does not choose to enforce the condition for the payment of the whole, his right to realize the several instalments is not, even as regards limitation, affected by the debtor's default. (Chunder *v.* Bisassurree, 13 C. L. R., 243; Kanchon *v.* Sheoprosad, I. L. R., 2 All., 291; Karakavolasa *v.* Karanon, I. L. R., 3 Mad., 256; Asmatullah *v.* Kally Churn, I. L. R., 7 Calc., 56, 60; Nilmadhob *v.* Ramsodoy, I. L. R., 9 Calc., 857). Also cf. I. L. R., 14 Calc., 352, and I. L. R., 16 All., 371. It may be added that most of these cases have been commented upon in I. L. R., 15 Calc., 502, and I. L. R., 21 Calc., 542.

Latest rulings of the Calcutta and Allahabad High Courts.

It has been held by the Calcutta High Court that although art. 75 does not apply to execution cases, the same question of the effect of a waiver may arise in such cases, and that if the decree-holder waives the benefit of the special provision in his favor, limitation will not run from the date of the default in respect of which there has been such waiver. (Ram Culpo *v.* Ram Chunder, I. L. R., 14 Calc., 352). In a later case on the subject, Wilson and O'Kinealy, JJ., observe

Different views of the two High Courts.

that the mere fact of not enforcing the special condition is not sufficient to stop the running of time. But the benefit of the provision may be waived *by payment and receipt of an overdue instalment.* In the absence of *such waiver*, limitation as regards the whole balance runs from the date of the first default. Where there has been no such waiver, the subsequent instalments cannot, as such, be recovered although they fell due within three years of the application for execution. (Monmohun *v.* Durga Churn, I. L. R., 15 Calc., 503). Edge, C. J., and Blair, J., have held that *except* in cases where, by the *terms* of the instalment decree, on the happening of a default, the decree-holder has *no option*, (but is *bound* to execute the decree once for all for the *whole* amount due under it), the decree may be executed on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due. (Shankar *v.* Jalpa, I. L. R., 16 All., 371). But according to the latest decision of the Calcutta High Court no distinction can be drawn between a case in which it is provided that on non-payment of any instalment the whole amount *shall* become due, and one in which it is provided that on non-payment of an instalment the whole amount *may* be sued for. (See Hurri Pershad *v.* Nasib Singh, I. L. R., 21 Calc., 539). In the Allahabad Case, Edge, C. J., and Blair, J., construed the decree as giving the decree-holder an *option* to waive the benefit of the provision, and applied their rule, although it did not appear that the decree-holder had exercised such option by *accepting payment of an overdue instalment.*

Art. 76.	76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years ...	The date of the delivery to the payee.

[No. 76. (No. 76, Act IX).

This article is apparently based on the decision in Savage *v.* Aldrin, where a note payable on demand was deposited with a banker for delivery to the payee on his producing another note cancelled, and it was held that the payee had no ground of action till the note was delivered, and that therefore limitation ran only from that time. (Darby and Bosanquet, 20). Art. 76, however, applies whether the note is payable on demand or not.]

Art. 77.	77.—On a dishonored foreign bill where protest has been made and notice given.	Three years ...	When the notice is given.

[No. 77. (No. 77, Act IX). See Form No. 47, Sched. IV, Act XIV of 1882.

As to inland and foreign bills, see secs. 11 and 12, Act XXVI of 1881. As to dishonor, notice and protest, see secs. 91—104, *ibid.*

In the case of a foreign bill, time runs when notice of dishonor is given, not when the bill falls due or acceptance is refused. (Darby and Bosanquet, 23).]

78.—By the payee against the drawer of a bill of exchange which has been dishonored by non-acceptance.	Three years	...	The date of the refusal to accept.	Art. 78.

[No. 78. (No. 78, Act IX).

Payee.—The last endorsee is also "the payee" within the meaning of this article. According to English cases, time runs when notice of non-acceptance is given. Here it runs from the date of refusal to accept—not from the date of non-payment on the due date. The subsequent non-payment which would (but for the prior refusal to accept) have constituted a cause of action, is disregarded in the computation of the period of limitation. (Wilkinson *v.* Verity, L. R., 6 C. P., 206; Miller *v.* Dell, 1891, 1 Q. B., 468). Compare art. 79 of Act IX, the provisions of which have not been re-enacted. Dr. Stokes suggests that the starting point fixed by art. 78 should be altered. (Anglo-Indian Codes, Vol. II, p. 950).]

79.—By the acceptor of an accommodation-bill against the drawer.	Three years	...	When the acceptor pays the amount of the bill.	Art. 79.

[No. 79. (No. 81, Act IX).

A suit under this article is hardly a suit *on* the bill. If a bill be accepted for the accommodation of the drawer, the drawer is the principal debtor, and the acceptor is the surety. The drawer is impliedly bound to indemnify the accommodation acceptor, and such acceptor is not actually damnified until he actually pays the bill. See art. 83. The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the (ordinary) acceptor are, generally speaking, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be. See sec. 37, Act XXVI of 1881.]

80.—Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	Three years	...	When the bill, note, or bond becomes payable.	Art. 80.

[No. 80. (No. 80, Act IX).

This is a general article. See notes to arts. 66, 69, 73 and 75. A suit by the endorsee of a bill or promissory note against the endorser or against the other parties to the bill or note will be governed by this article, if arts. 69—76 be inapplicable. See art. 73, Act IX, the provisions of which have not been re-enacted, and cf. Mohindro *v.* Jadub, 14 W. R., O. C., 5. A suit for damages by the drawer against the drawee or acceptor, for dishonoring a bill, arises out of the bill, but is not a suit on the bill. A suit by an endorser who has paid the bill or note against the principal debtor or against the other parties is perhaps not a suit *on* the bill or note. (See Mr. Justice O'Kinealy's notes on sec. 29, Civil Procedure Code). Such a suit is probably governed by arts. 81—83. See notes to art. 79.

In suits against Government, on Government Promissory Notes, limitation runs from the date on which the note becomes payable Govt. Pro. Notes.

after notice given in the Gazette in accordance with the terms of the loan. (See Financial Notification No. 59, dated the 11th January 1882). Bank notes are never paid unless given up by the holder at the time of payment so that they are not affected by the laws of limitation. (Hinsdale *v.* Larned, 16 Mass. R., 68 ; Banning, 278, and Angell, sec. 142).

Bank Notes.

Pro. Notes of peculiar forms.

If in a single bond, with a day specified for payment, there is also a liability for immediate demand of the amount, before the expiration of the term of the bond, on the occasion of a default in the payment of interest, the article under which it comes is art. 80, and not art. 66 or 75. (Per Spankie, J., in Ball *v.* Stowell, I. L. R., 2 All., 322). A suit on a bond "payable at any time within six years on demand" is governed by this article. See notes to art. 73. A bond or note to pay a sum of money on demand after the obligee attains majority is governed by art. 80, the three years running from actual demand after the obligee attains majority. (Karindan *v.* Suppe, 3 Mad. L. J., 199). For other peculiar forms of notes, see notes to arts. 72 and 73, and pp. 709, 710, *supra.*

Enforcing lien on pledged or hypothecated moveables.

In the case of a suit upon an unregistered bond whereby certain moveable property in the possession of the debtor was pledged as security, it was held in Madras that the power to bring the moveable property to sale is an incident in the nature of an accessory to the right to recover the debt, and if that right becomes incapable of being enforced owing to the lapse of three years under art. 80, the power to sell the security must likewise cease to be capable of being exercised. (Vitla *v.* Kale Kara, I. L. R., 11 Mad., 153). In a suit upon a pledge of certain moveable property, the Calcutta High Court held that in so far as it was a suit to enforce a lien or charge upon the pledged property, it could not agree in the view taken by the Madras High Court, and that art. 120 was applicable to that part of the suit. (Nim Chand *v.* Jagabandhu, I. L. R., 22 Calc., 21). See also notes under art. 57.

Suit for balance of debt, after sale of pledged securities.

It has been held in England, in the case of money advanced on a deposit of certain securities, that where a part of the money has been realized by a private sale of the securities, a suit for the residue or balance must be instituted within the time allowed for the realization of the whole debt. Even an express promise by the debtor to pay the deficiency in case the sale-proceeds be not sufficient to pay the whole debt does not give the creditor a separate cause of action for the recovery of such deficiency. (See Barker's Claim, 1894, 3 Ch., 290). See notes to art. 57, at p. 694, *supra.*]

Art. 81.	81.—By a surety against the principal debtor.	Three years	...	When the surety pays the creditor.

[No. 81. (No. 82, Act IX). See arts. 61 and 83.

The person who gives a guarantee is called the "surety," the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the creditor. (Sec. 126, Act IX of 1872). See notes to art. 83.

Suit *on* a guarantee.

Where a surety pays a co-surety who has paid the creditor, a suit by such a surety against the principal debtor is not governed by this article. (See Rivaz, p. 169). A suit by the creditor (on a contract of guarantee) against the surety is governed by art. 65, art. 83, or arts. 115 and 116. Dr. Stokes suggests that suits on guarantees should be specially provided for. See notes to art. 65, and art. 83.]

82.—By a surety against a co-surety.	Three years	...	When the surety pays anything in excess of his own share.	Art. 82.

[No. 82. (No. 83, Act IX). This article deals with a particular class of suits for contribution. See arts. 61, 99 and 100, and the notes to art. 83. No cause of action arises to the surety until he pays anything in excess of his proportionate share.

A suit by a surety against a co-surety is not barred by limitation, simply because a suit by the creditor against such co-surety is so barred. (Wolmershansen *v.* Gallick, 1893, 2 Ch., 514).

The right to contribution is, generally, a personal right, and the remedy is a personal remedy. See *In re* Leslie *v.* French, 23 Ch. D., 552, 563, and the notes to art. 132.]

83.—Upon any other contract to indemnify.	Three years	...	When the plaintiff is actually damnified.	Art. 83.

[No. 83. (No. 84, Act IX). One special case of an implied contract of indemnity is provided for by art. 79. For another, see art. 81. If a man request another to become surety for him, and that other becomes surety and is obliged to pay, the principal debtor is bound by an implied contract to indemnify the surety, and to repay him any amount which, as such surety, he is obliged to pay. (7 W. R., 386, F. B.)

Suits for contribution.

But a suit for contribution by a surety against a co-surety is not founded upon any contract. The obligation to contribute arises from what Austin calls a *quasi*-contract. (Rambux *v.* Modhoosoodun, 7 W. R., 377, F. B.) For the views of the High Courts of Madras, Bombay and Allahabad on this subject, see Govind *v.* Bapu, 5 Mad., 200; Huri *v.* Abasahib, I. L. R., 4 Bom., 321; Nath *v.* Baij, I. L. R., 3 All., 66. A recent Full Bench of the Calcutta High Court approves of the ruling of the Allahabad High Court. (Krishna *v.* Gopimohun, I. L. R., 15 Calc., 652). Art. 82 applies to a co-surety's suit for contribution. For other cases see notes to art. 61.

A suit by the creditor, barred as against the principal debtor, is not necessarily barred as against the surety. (Kristo *v.* Radha, I. L. R., 12 Calc., 330). But cf. Bhupsing *v.* Zainulabdin, I. L. R., 9 All., 205, at p. 210.

A suit by the creditor against a surety may be barred by limitation, at a time when a suit by the surety for contribution against his co-sureties is not yet so barred. (1893, 2 Ch., 54).

A contract to indemnify the plaintiff against any misbehaviour of the promisor or of a third person comes under this article. Art. 65 may also apply to it. Where the misbehaviour consists of an act of embezzlement, the date of the embezzlement is the date when the plaintiff is actually damnified. (Shapurji *v.* The Superintendent, 12 Bom., 238).

Insurance is a contract of indemnity, according to English law, but art. 86 specially provides for suits on policies of insurance.

Guarantee and Indemnity.

In a contract of guarantee there is an *expectation* that a third person will perform the promise or discharge the liability and the promise of the guarantor or surety is *conditional* on the *default* of this third person. The guarantor or surety is liable only *in the event* of this third person failing to perform his engagement or discharge his liability. In a contract of indemnity, the promisor engages *unconditionally* to save the promisee from loss, *independently* of the

Guarantee, Indemnity and Insurance.

question whether a third person makes *default* or not. A contract of guarantee does, but a contract of indemnity does not, fall within the English Statute of Frauds. (Gould *v.* Courad, 1894, 2 Q. B., 885). The Indian Contract Act, 1872, sec. 124, enacts: "A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called a contract of indemnity." A "contract of guarantee" is a contract to perform the promise or discharge the liability of a third person in case of his default. (Sec. 126). A contract of indemnity is thus distinguishable from a contract of insurance as well as from a contract of guarantee. But suits on guarantees have not been specially provided for. See notes to art. 65.

Indemnity by assignee of lease.

An express or implied promise by the assignee of a lease to indemnify the assignor against breaches of the covenants contained in the lease comes under this article. (Pepin *v.* Chunder, I. L. R., 5 Calc., 811). But cf. Rutnessur *v.* Hurish, I. L. R., 11 Calc., 221, 226, as to when the cause of action may be said to arise,—on the date of the breach by the assignee, or the date of payment by the assignor to his lessor. For another instance of a claim for damages (by way of set-off) under art. 83, see Pragiloll *v.* Maxwell, I. L. R., 7 All., 284.]

Art. 84.	84.—By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	Three years ...	The date of the termination of the suit or business or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.

[No. 84. (No. 85, Act IX). Compare art. 56.

A suit by a *mookhtear* for his costs is probably governed by art. 56 or art. 115.

Improper discontinuance.

Where there is an express agreement as to the time of payment, art. 115 or 116 will apply. Where the business or suit is improperly discontinued, an attorney (or vakil) has no cause of action. (See Nicholls *v.* Wilson, 11 M. and W., 106; Thomson's Act IX of 1871). It has been held by the Privy Council that an attorney is not bound to proceed in a cause unless he receives adequate advances from time to time for necessary disbursements, upon reasonable notice to his client.

Termination of suit or business.

The date of the decree or final order is the date of the termination of the suit. If the word "suit" in this article does not include appeals and applications, the word "business" must include work done in respect of applications and appeals. It has been held that until the costs are taxed and inserted in the decree, and the decree is issued, the suit or appeal does not terminate within the meaning of this article. (Narayan *v.* A. Champion, I. L. R., 7 Mad., 1). But it has been also laid down that "the termination of a suit is when judgment is given in the Court in which the action is commenced." (Balkrishna *v.* Gobind, I. L. R., 7 Bom., 518). The suit does not necessarily terminate when the parties themselves settle their disputes out of Court. (Hearn *v.* Bapu, I. L. R., 1 Bom., 505). An *application* against a suitor, in respect of costs due to his attorney, where such application is allowable, is not governed by this article. (Abba *v.* Abba, I. L. R., 1 Bom., 253).

A suit for the costs of drawing a conveyance, &c., falls within this article.

In the absence of an agreement a vakil is entitled to a *quantum meruit*. (Keshav *v.* Jamsetji, I. L. R., 12 Bom., 557). Sec. 28 of the Legal Practitioners' Act does not debar a pleader from recovering his legal fees for work and labour done. See Ram *v.* Kunji, I. L. R., 9 Mad., 375.]

85.—For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years	...	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.	Art. 85.

[No. 85. (No. 87, Act IX ; Sec. 8, Act XIV).

Under Act XIV, this provision was confined to mutual accounts between merchants and traders, but the term "merchants and traders" was not construed very strictly. (See Ghaseeram *v.* Monohor, 2 Ind. Jur., N. S., 241). Under Act IX, limitation commenced to run from the date of the last item admitted or proved in the account. This article applies to mutual accounts between any two persons (whether merchants or not), and limitation runs (as under Act XIV) from the close of the year in which the last item admitted or proved is entered. The last item draws after it those of longer standing. Old law.

An account is a detailed statement of a series of receipts (credits) and disbursements (debits). An account is open when the balance is not struck, or though struck is not accepted or acknowledged to be correct by all the parties. An account is current when it has been going on as a continuous account between the parties. A running or continued account between two or more parties is an account current. Accounts are current until they are stopped, *i.e.*, they are current so long as there is continuity in the dealings between the plaintiff and the defendant. Art. 85 applies if the account was not settled between the parties, but was open and current, and there were reciprocal demands between the parties. (Sitayya *v.* Rangereddi, I. L. R., 10 Mad., 259, 264). It is enough if the dealings between the parties amounted to mutual debits and credits on both sides. Account open, current and mutual.

It is not necessary that the parties should each keep accounts in writing. It is enough if one of the parties keeps the accounts in writing. (Lakshinmya *v.* Jagannathan, I. L. R., 10 Mad., 199, 202 ; Velu *v.* Ghose, I. L. R., 17 Mad., 293). Keeping accounts.

Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. (Angell, sec. 149). Where the dealings on either side are so independent of each other that neither party in giving credit to the other relies on the debt which he has against him, there are no mutual dealings. (Shephard, 56). The ordinary rule is that the transactions on each side must create independent obligations on the other. Obligations on one side, and complete or partial discharges on the other, are not sufficient to render the accounts mutual. (Hirada *v.* Gadigi, 6 Mad., 142). Mutual accounts.

If there are such dealings between the plaintiff and the defendant in the course of business that sometimes the balance is in favor of

Shifting balance.

one party and sometimes of the other, the dealings are mutual within the meaning of the law. (Per Sir B. Peacock, C. J., in Ghaseeram *v.* Monohor, 2 Ind. Jur., N. S., 241). See also Harrandas *v.* Vissandas, I. L. R., 6 Bom., 134). A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality. (Velu *v.* Ghose, I. L. R., 17 Mad., 293). In Normul *v.* Pookermul, decided on the 19th August 1879, and reported in the *Englishman* of the 26th of that month, Mr. Justice Wilson held that there should be on each

Reciprocal demands.

side matters which, if there were no running account, would form a cause of action. Money lent on one side, and money paid on account on the other, with the balance always in favor of the first, do not constitute reciprocal demands. A continuous account between prin-

Account between principal and agent may be mutual.

cipal and agent with debits and credits on each side of it and containing several items which bring down the mutual dealings to a date which is within the prescribed period of limitation, falls within this article. (See Watson *v.* Aga Mehdee, L. R., 1 Ind. App., 346). Items in a mutual account, even if dated more than three years before the institution of the suit, are not barred by limitation. (*Ibid.*) In this case there was an actual agreement between the principal and the agent, that the former should be bound to pay the balance

Banking accounts.

on an adjustment of accounts. In Kushuls *v.* Behari (I. L. R., 3 All., 523), the Allahabad High Court expressed an opinion that art. 85 would apply to ordinary banking accounts. In Naraindas *v.* Vissandas (I. L. R., 6 Bom., 134), Sarjeant, J., following the decision of Peacock, C. J., and Norman, J. (in 2 Ind. Jur., N. S.), held that an account of mutual dealings in hundis, where the defendant used to draw hundis on the plaintiff, and in order to keep him in funds used to remit hundis drawn in favor of the plaintiff on other firms, was a mutual account within the meaning of this article.

The following is a brief summary of the views of Pontifex, J., and of Sargent, J., about mutual accounts and the last item therein :—

Continuance of mutual accounts and the last item therein.

If the balance was sometimes in favor of the defendant, but generally in favor of the plaintiff (banker), the account between them is hardly a mutual one. If during the currency of the account each of the parties could occasionally say to the other "I have an account against you," the accounts between them would be mutual. Where the accounts could be called mutual, they could, at the latest, be mutual down to the date when the defendant made his last payment to the plaintiff (banker). But from the date when the balance was for the last time in favor of the plaintiff, and since which the account continued to be against the defendant, it could not be said that there were reciprocal demands between the parties. And "the last item admitted or proved" in the article mean such item on the defendant's side of the account. (See Hajee Mahomed *v.* M. Ashruf-oonnissa, I. L. R., 5 Calc., 759). In England, "where there have been mutual accounts, the statute is retarded by every fresh item, provided such item is within six years of previous items. And it seems to make no difference on which side the items are which are within the six years." (Banning, 201 ; see also Angell, sec. 147). It has been held in India by Sargent, J. (I. L. R., 6 Bom., 134, 138), that where there is nothing to show a change in the nature of the dealings between the parties, the account (being a continuous one) would be a mutual account down to the date of the last advance made by the plaintiff (banker), although, latterly, the balance has been uniformly in his favor. The extent or amount of mutuality does not affect the question. Two transactions of a proper kind in an account may be sufficient to render it mutual. (Srinath *v.* Pittar, 5 B. L. R., 550).

Is it necessary that the last item admitted or proved should indicate the continuance of mutual dealings? Act XIV of 1859 expressly provided for this. It was held under sec. 8 of that Act that the plaintiff's suit was barred if it clearly appeared that the relationship between the parties was closed more than four years before the suit was commenced, during which period the plaintiff could show nothing but entries in his own books of charges for interest. (Meher Chand *v.* Mooroolyram, 14 W. R., O. J., 7). Such entries can never be sufficient.

The year as computed in the account is not necessarily the English year or the Bengali or the Fusli year, but may be something different. If the accounts are made to the particular date on which the books are closed, the parties are allowed three years from the end of such conventional year. If the books are regularly made up year by year to the 30th June, limitation runs from the 30th June. The close of such year is the starting point of limitation, because that is the time when the balance will, in the ordinary course of business, be struck. See Srinath Das *v.* Park Pitter, 14 W. R., O. J., 41; 5 B. L. R., 550.] Year how computed.

86.—On a policy of insurance when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	Three years ...	When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff or any other person.	Art. 86.

[No. 86. (No. 88, Act IX). This article does not apply when custom allows a certain *time of grace*. (See Norotomdas *v.* Dayabhai, 6 Bom., 34). If the sum assured is not payable immediately, art. 115 may apply. Time does not run from the date of receipt of notice of death or loss, but from the date when the insurers receive proof of death or loss from the plaintiff or from any other person. For the several kinds of loss, see Forms Nos. 49-50, Sch. IV, Act XIV of 1882.]

87.—By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years ...	When the insurers elect to avoid the policy.	Art. 87.

[No. 87. (No. 89, Act IX). The premia already paid become recoverable on failure of the consideration, *i.e.*, when the insurers elect to avoid the policy. (See notes to arts. 62 and 97).]

88.—Against a factor for an account.	Three years ...	When the account is during the continuance of the agency, demanded and refused, or where no such demand is made when the agency terminates.	Art. 88.

[No. 88. (No. 64, Act IX).

A factor is an agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation commonly called factorage or commission. A factor may buy and *Factor.*

sell in his own name, and has a special property in, and a lien on, the goods. During the continuance of the agency, the right to sue accrues on demand and refusal. But if the agent dies, the action against his representatives must be brought within three years of his death, provided no demand had been made during his life. (See Lawless *v.* Calcutta Landing Co., I. L. R., 7 Cal., 627, 632).

Where agent dies *before* demand.

Broker.

A suit for an account against a *broker* for the sale of goods sent to him by the principal is governed by art. 89, which is, as regards the period of limitation, and the time from which limitation commences to run, exactly similar to art. 88. (Babu Ram *v.* Ram Dyal, I. L. R., 12 All., 541).

When agency terminates.

An agency for the sale of goods does not, with reference to secs. 201 and 218 of the Contract Act, terminate immediately on the sale of the goods. Until the agent pays the price of the goods to the principal, his agency continues, and a suit for an account or for the price of the goods is not barred simply because more than three years have elapsed from the date of the sale, or even from the time when the plaintiff obtained knowledge of the agent's breach of duty. (Babu Ram *v.* Ram Dyal, I. L. R., 12 All., 541).

The termination of an agency like any other fact may be inferred or presumed from collateral facts. (Dinomoyi *v.* Lachmiput, 6 C. L. R., 101, 106, P. C.) The agency terminates when the agent ceases to discharge his duties by departing from the principal's service. (Hurronath *v.* Krishna, I. L. R., 14 Calc., 147, P. C., at p. 154). Even when the suit for an account against an agent is not barred by limitation, many presumptions will be made in his favor, if he is called upon to render an account of transactions which took place long ago. (*Ibid.*, at p. 154).]

Suit for account—what?

A suit for an account in its legal sense is not confined to a suit for a statement of what has been done with monies, &c. To account for monies is to pay any balance which might be found to be due upon taking the accounts. (Kally Kissen *v.* Juggut Tara, 11 W. R., 76). For the ordinary form of prayer for an account, see Shoshi *v.* Guru, I. L. R., 7 Calc., 89, 91. A suit for a "settlement of accounts" (under sec. 94, Act XI of 1881), however, is a suit, the *main* object of which is to settle disputed items of credit or debit, although the *ulterior* object of obtaining such a statement of accounts may be that the plaintiff may obtain a decree for money due to him, if any. (Rohan *v.* Jwala, I. L. R., 16 All., 333, at pp. 335, 336).

Art. 89.	89.—By a principal against his agent for moveable property received by the latter and not accounted for.	Three years	... Same as in preceding article.

[No. 89. (No. 90, Act IX). See notes to art. 88.

The suit under this article is not necessarily for specific moveable property. It may be for money received by the agent during his agency. The agent may receive money from the principal for general purposes, or with directions to apply it to a particular purpose, or he may receive money from a third person for the principal, and in either case he is legally bound to account for such money when required to do so by the principal. A suit for an account (in its legal sense) against an agent is virtually a suit for property received and not accounted for. Moveable property in the possession of a relative as *manager* may be treated as property received by an agent. The agency, in such a case, may be considered to terminate when the

manager sets up a title in himself adverse to his principal. (Kally v. Dukhee, I. L. R., 5 Calc., 692, 698). This decision has, to a certain extent, been followed in Madras. It has been held there that where the alleged agent had in a previous suit denied the plaintiff's title and also the relationship of principal and agent, time commenced to run against the plaintiff from the date of such denial. (Sankaran v. Krishna, I. L. R., 16 Mad., 456). But supposing the plaintiff succeeds in establishing the original relationship of principal and agent, a mere denial of agency by the agent can hardly affect the question of limitation. (See 4 Mad. L. J., 23; see also pp. 119, 140, 141 and 305, *supra*). Denial of agency.

A suit for a declaration of right to joint property and for an account of the profits against a *co-owner* is not a suit against an agent, under this article. (Habibulla v. Safdar, I. L. R., 7 All., 25). Co-owner, not agent.

Where the agent, on the demand of the principal, promises to render accounts on a future date, but does not, limitation will, it has been held, run from that date, as that is the date when he virtually refuses to render accounts. (Hori v. The Administrator-General, 3 C. L. R., 446). It may be doubted, however, if an absolute refusal by the agent is not necessary to set time running against the principal. Dr. Stokes says 'refused' in this article means 'expressly refused.' (Anglo-Indian Codes, Vol. II, p. 987). Refusal, express or implied.

Where money is advanced by the principal to his agent, the latter receives the money subject to an obligation to account for the money. No cause of action accrues to the principal at the date of the advance. (Kally Kissen v. Juggut Tara, 11 W. R., 76).

Where an agent for the sale of goods receives the price thereof, the agency does not terminate with reference to secs. 201 and 218 of the Contract Act (IX of 1872), until he has paid the price to the principal; and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of Sch. II, art. 89 of the Limitation Act (XV of 1877): and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate even at the time when the plaintiff obtains knowledge of the defendant's breach of duty. (Babu Ram v. Ram Dyal, I. L. R., 12 All., 541). Termination of agency.

A suit against an agent employed in the management of land or collection of rents, for money received or accounts kept in the course of such employment, or for papers in his possession, was (except in cases of fraud) governed by the one year's rule under sec. 30, Act VIII of 1869, B. C., and sec. 24, Act X of 1859. (See Kumood v. Purna, I. L. R., 4 Calc., 547; Goloke v. Ramkanto, 3 C. L. R., 444; Soshimohun v. Guruchurn, 8 C. L. R., 285). If an agent delivers an account showing himself to be indebted, a fresh cause of action arises upon the admission by the settlement of account. An action for the balance on the account will be governed by the general law of limitation. Art. 64, or some other article, will apply. (See Chowdry v. Fouzdar, 2 Hay, 509; Syfoolah v. Jhapa, 20 W. R., 309; Pearee v. Jardine, 22 W. R., 338). Collection agents.

Suits against agents are not specially provided for in the Bengal Tenancy Act, 1885. A suit for an account by a Zemindar against his Dewan is governed by this article or by art. 120. (Harronath v. Krishna, I. L. R., 14 Calc., 147, at pp. 149, 154, P. C.) Dewans.

Suits by agents *against* the *principal* are not provided for by arts. 88, 89 and 90.

Where the agent is appointed under a registered agreement, and the suit against him is based on the breach of a registered covenant, art. 116 applies. A distinction may be made only as regards sums received by him as an ordinary agent. (Harrendar *v.* Administrator-General, I. L. R., 12 Calc., 357).]

Art. 90.	90.—Other suits by principals against agents for neglect or misconduct.	Three years ...	When the neglect or misconduct becomes known to the plaintiff.

[No. 90. [No. 89, Act IX).

This article governs a suit for damages against an agent in respect of the loss arising from his misconduct in neglecting to sue for debts due to his principal, or in so negligently selling his principal's property that the proceeds cannot be realized. (See Baboo Lall *v.* Vaughan, 2 Agra, 306).]

A suit by a principal to establish the relationship of principal and agent when the defendant denies such agency is in the case of moveable property governed by art. 120. In the case of an agent for the collection of rent of land, art. 144 may apply. (See Sankaran *v.* Krishna, I. L. R., 16 Mad., 456, at p. 458).

Art. 91.	91.—To cancel or set aside an instrument not otherwise provided for.	Three years ...	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

[No. 91. (No. 92, Act IX).

Other analogous articles.

Art. 44 provides for a suit by a ward, who has attained majority, to set aside a sale (whether by an instrument of conveyance or otherwise) by his guardian. Art. 92 or 93 governs a suit for a declaration in respect of an instrument which is impugned as a forgery. Art. 114 applies to a suit for the rescission of a contract. Art. 125 governs a suit to have an alienation of land by a Hindu or Muhammadan female having a qualified estate in it, declared to be void except for her life or until her remarriage. Art. 126 provides for a suit by a Hindu governed by the Mitakshara to set aside his father's alienation of ancestral property. Suits to set aside certain sales, orders and official acts, are provided for by arts. 12, 13 and 14. Suits to contest certain awards fall under art. 45.

Oral transfer. Rectification.

A suit to set aside an oral devise, sale or alienation in not governed by art. 91. A suit for the rectification of an instrument (see sec. 31, Act I of 1877) is also not governed by this article. See art. 120.

What is *setting aside.*

The expression "suit to set aside an adoption" (see art. 129, Act IX of 1871) is not quite precise as applied to any suit. In the ordinary language of Indian lawyers, the expression has been applied to proceedings which bring the validity of an alleged adoption under question, and has been so applied quite indiscriminately to suits for possession of land, and to suits of a declaratory nature. (Jagadamba *v.* Dakhina, I. L. R., 13 Calc., 308, at pp. 319, 320). The expression "suit to set aside an instrument" has also been applied by Indian Judges to suits for recovery of possession of land, and to suits where no such relief is asked for. (See Tacoordeen *v.* Nawab, 21 W. R., 340, P. C.; Raj Bahadoor *v.* Achumbit, 6 C. L. R., 12, P. C.) But the latter expression is more precise than the former. And it has been held that a suit to

set aside an instrument is a suit for substantive relief, and not a suit for a declaratory decree. (21 W. R., 340, P. C. ; Sobha *v.* Sahodri, 9 I. L. R., 5 All., 322; Joynarian *v.* Grish Chunder, 22 W. R., 438). A decree setting aside a deed of sale purporting to have been executed by plaintiff's ancestor in favor of the defendant, is more specific than a declaration that the plaintiff is the rightful owner of the property. On a finding that the deed of sale relied upon by the defendant is not genuine or valid, the deed should be ordered to be cancelled and set aside. (21 W. R., 340, P. C.) But when a putnee lease and a will executed by a Hindu widow in favor of the defendant was found to bind her life-interest or her own absolute property only, it was held that the instruments in question being innocuous to the plaintiff, who, as reversionary heir, sued to recover possession of the property left by the widow's husband, it was immaterial to the plaintiff whether the deeds were set aside or not. The plaintiff in such a case is "entitled to recover notwithstanding those documents but without in any degree compromising any rights which other parties may have under them." (6 C. L. R., 12, at p. 15, P. C.) When a man conveys property to which he is not entitled, it does not follow that the conveyance is absolutely void, or ought to be cancelled or retained by the Court. It is often sufficient to declare that the deed which the plaintiff impeaches did not pass any right to the defendant, leaving the deed to operate as regards the rights of persons not parties to the suit. (Rai Kishori *v.* Debendra, I. L. R., 15 Calc., 409, at p. 421, P. C.)

Recovering property *notwithstanding* instrument.

A mere declaration that a certain deed of mortgage executed by a debtor in favor of the defendant is a *benami* or collusive transaction, and inoperative as against the plaintiff who has purchased the debtor's property, leaves the deed to operate as between the parties thereto, and therefore does not amount to cancelling or setting aside that deed. Pachamuthu *v.* Chinnappan, I. L. R., 10 Mad., 213. See also Ikram *v.* Intizam (I. L. R., 6 All., 260). In Tawanager *v.* Kura Mal (I. L. R., 3 All., 394), it was assumed (not decided) that art. 91 might apply to a suit for a mere declaration that a deed of sale executed by a judgment-debtor is collusive and inoperative as against the plaintiff decree-holder. See p. 732, *infra*.

Declaring a deed *benami* and ineffectual as regards plaintiff's rights.

Where the claim is not to have the instrument (executed by the ostensible holder of property, without the authority of the real owner) delivered up and cancelled, but to have it declared ineffectual in respect of the real owner's (the plaintiff's) right in the property, it is not a suit for the cancellation or setting aside of an instrument to which art. 91 will apply. (Sobah *v.* Sahodra, I. L. R., 5 All., 322). A suit by the real owner for a declaration that a deed executed by him in favor of the defendant is only a *benami* transaction, is not governed by art. 91. (See Nagathal *v.* Ponnusami, I. L. R., 13 Mad., 44, cited at p. 733, *infra*).

The terms "cancelling" and "setting aside" are often used indiscriminately without any distinction. (See Tacoordeen *v.* Nawab, 21 W. R., 340, P. C. ; Raj Bahadoor *v.* Achumbit, 6 C. L. R., 12, P. C. ; Ajit *v.* Bijoy, I. L. R., 11 Calc., 66, P. C.; Janki *v.* Ajit, I. L. R., 15 Calc., 58, P. C.)

Cancelling or setting aside.

Chapter V of the Specific Relief Act (see sec. 39 of Act I of 1877) speaks of the cancellation of instruments. Any person who has reasonable apprehension that an instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may order it to be delivered up and cancelled. The plaintiff may sue for the cancellation of an instrument, although he was not a party to it. He may sue to cancel a forged or invalid deed

Cancellation, total or partial.

Cancellation, total or partial.

which purports to have been executed by his vendor or other predecessor in interest. See Illustrations (*b*) and (*c*), sec. 39, Act I of 1877. Such deed may continue to operate as between the parties thereto. An instrument evidencing different rights or different obligations may be cancelled in part, and allowed to stand for the residue. (Sec. 40, Act I of 1877). Is it absolutely necessary that in a suit to set aside an instrument, the instrument should be delivered up or cancelled for all purposes, and as against the plaintiff as well as all the parties thereto? Where the rights of all other persons under the instrument are not intended to be affected by the decision, and the plaintiff is only entitled to recover the property notwithstanding the instrument, the instrument, *strictly* speaking, is not set aside or cancelled (6 C. L. R., 12, at p. 15, P. C.; I. L. R., 15 Calc., 409, at p. 421, P. C.) A deed of *sale* may be *partially* cancelled or set aside so that it may have effect only as a *security* for a certain sum between the same parties. (See Ajit *v.* Bijai, I. L. R., 11 Calc., 61, P. C.) Where a bill of exchange purports to have been successively endorsed by B, C, and D, any *one* of them may sue to have *his* endorsement cancelled, leaving the bill to stand in *other* respects. (Sec. 40, Act I of 1877).

Mere declaration of invalidity of deeds.

Under sec. 42 of the Specific Relief Act, there can be no suit for a mere *declaration* that an *instrument* is *invalid*. Under sec. 39, it may be adjudged void or voidable, and ordered to be delivered up and cancelled. (See Srirangachariar *v.* Ramasami, 4 Mad. L. J., 106, at p. 109. *Per* Collins, C. J., and Davies, J.)

Field, West, Ayyar, Shephard and Birdwood, JJ., on art. 91.

According to Mr. Justice Field, art. 91 applies to all suits to set aside instruments, even when they affect immoveable property, provided they are made with authority, have immediate operation given to them, and are not null and void so far as the plaintiff and his interests are concerned, supposing, of course, that the instruments are such that, if allowed to stand unchallenged once they become known to the plaintiff, they might become important evidence against him. (Roghubar *v.* Bhikyalal, I. L. R., 12 Calc., 69, at pp. 74 and 75). The principle laid down by Mr. Justice Field has been approved of in Subbaraya *v.* Nataraja, I. L. R., 14 Mad., 98, at p. 102, and Mahabir Pershad *v.* Hurrihur, I. L. R., 19 Calc., 629, at p. 634. It has been held in the Central Provinces that art. 91 will govern suits to recover property when the property has been alienated by an instrument which binds the plaintiff until it is set aside. When the plaintiff alleges that A has no right to the property, and that he has alienated it to B, who has got possession, it is immaterial to the plaintiff whether the instrument alienating the property is cancelled or not, inasmuch as on the plaintiff's allegation it can convey no title. (Seetaram *v.* Nilu, 1 Cent. Prov. L. R., 75). According to West and Haridas, JJ., art. 91 applies to cases where the plaintiff asks for the *bare cancellation* of an instrument, and not to cases where the remedy sought is the recovery of land alleged to be wrongly withheld from him. If it be possible for the Court to award possession to the plaintiff, and hold that the defendant had no right to keep the same, without declaring that the instrument relied upon by the defendant is void (*i.e.*, without expressly setting aside such instrument), it is immaterial to the plaintiff whether the instrument is cancelled or not. (Boo Jinataboo *v.* Sha Nagar, I. L. R., 11 Bom., 78, at p. 82). This case appears to have been acted upon by Sargent, C. J., in Nabab Mir *v.* Yassin Khan, I. L. R., 17 Bom., 755, at p. 758. In the earlier case the learned Judges observed: "Effect can be given to the article in question (art. 91) by applying it to the well-known class of cases of outstanding instruments by which,

should they pass into the hands of an innocent holder for value, such holder would have a right to recover on them."

For the opinion of Shephard, J., see Unni *v.* Kunchi, I. L. R., 14 Mad., 26, for that of Birdwood, J., see Abdool *v.* Kriparam, I. L. R., 16 Bom., 186, and for that of Ayyar, J., see I. L. R., 16 Mad, 311. All these cases have been referred to *infra*.

There can be no doubt that art. 91 applies where the *only* relief asked for is the setting aside of an instrument not otherwise provided for. See Uma Shankar *v.* Kalka, I. L. R., 6 All., 75, at p. 76. Article v applicable.

Where the instrument impugned had operation given to it, but is *voidable* at the option of a party to the instrument, he *must*, it is apprehended, sue to set it aside within three years.

It is also apprehended that art. 91 is applicable even in cases for the recovery of immoveable property, if the plaintiff cannot possibly succeed without displacing an apparent title under an instrument by virtue of which the defendant is in possession. Where the *primâ facie* title is with the defendant, he ought to retain his possession until that is displaced. (See Jagadamba *v.* Dakhina, I. L. R., 13 Calc., 308, at pp. 318, 321, P. C.) Even where the plaintiff does not sue to set aside any instrument, but merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute, his suit may *involve* the setting aside of any instrument of transfer executed by the plaintiff or his predecessor, under which the defendant may claim to be in possession ; for the defence of possession founded on the transfer directly involves the decision of the question,—was the transfer valid? Any suit in which the decree prayed for involves the decision of the question of validity of an instrument of transfer set up in defence is a suit to set aside such instrument. (See observations of their Lordships of the Privy Council in Mohesh *v.* Taruck, I. L. R., 20 Calc., 487, at p. 495, P. C.) If it is necessary to set aside the instrument in order to follow or reach the property, the limitation applicable is not twelve, but three years. (Per O'Kinealy, J., in Raghubar *v.* Bhikya, I. L. R., 12 Calc., 69, at p. 81). It has been distinctly held by the Privy Council that when the possession of immoveable property cannot be recovered until a deed of sale has been set aside, and it is necessary to bring a suit to set aside the deed upon repayment of the inadequate consideration-money advanced by the defendant, the suit is not a suit for the possession of immoveable property in the sense to which the limitation of 12 years is applicable. (Janki *v.* Ajit, I. L. R., 15 Calc., 58, at p. 65). It was *not* alleged in this case that the sale relied upon by the defendant was *void* by reason of the vendor's unsoundness of mind, a *total* want of consideration, or for any other reason. It was a case of an unconscionable bargain brought about by the exercise of undue influence upon the vendor, and by collusion with the vendor's manager. (*Ibid.*, p. 64). Their Lordships of the Privy Council held that art. 91 of Act XV of 1877 applied to the suit, although the plaintiffs (the vendor and his donee) prayed for recovery of possession of the land conveyed by the deed sought to be set aside. The Judicial Commissioner of Oudh held that this suit was essentially a suit for possession of immoveable property, and, as such, fell within the twelve years' limitation. Their Lordships held, he was clearly wrong there. (*Ibid.*, p. 65). In Sundram *v.* Sittammal I. L. R., 16 Mad., 311, Ayyar, J., remarks that the plaintiffs in the Privy Council Case asked for a decree for their property being restored upon their paying to defendants so much of the consideration as might be found to be justly due under the sale-deed which was impugned for fraud. The prayer for the *cancellation* of the instrument Recovery of immoveable property, when it *involves* the setting aside of an instrument.

Remarks of Ayyar and Best, JJ.

and for the declaration that it created only a charge for the amount of consideration actually paid was an *essential* part of the relief claimed in the plaint. According to the learned Judge, art. 91 is not applicable to suits in which the only *substantial* relief claimed is the recovery of land. Even an express reference in such a suit to an outstanding instrument obtained by the defendant by fraud does not make art. 91 applicable to the suit, provided such reference is made by way of confession and avoidance in order to prevent the defendant from setting up the instrument as an answer to the plaintiff's claim, and provided the cancellation of the instrument is *not* an *essential* part of the relief claimed. Best, J., in the same case observes that the Privy Council case was one in which the conveyance was not only admittedly executed, but had also admittedly had *operation given* to it so as to affect the property. (*Ibid.*, pp. 315, 316). In the Madras Case before Ayyar and Best, JJ., the conveyance was obtained by *fraud*, and without *any* consideration, and the defendant did not get possession of the property *under* the conveyance, but subsequently by collusion with the plaintiff's tenants.

Is *defendant* barred by article?

It has been held in one case that even where the position of the parties is reversed, and the vendee of lands, as plaintiff, sues to enforce his right under the deed of sale, the vendor's tenant cannot (although a defendant) impeach the sale on the ground of want of consideration and fraud, if the vendor has allowed the three years prescribed by art. 91 to elapse before the suit is instituted. The circumstance that the vendor is in possession through his tenant does not affect the application of the Act. (Jugal Das *v.* Ambashanker, I. L. R., 12 Bom., 501). This ruling cannot, of course, apply where the vendor can shew that the deed which he neglected to challenge for three years is *null and void*, so far as he and his interests are concerned. (See I. L. R., 12 Calc., 69, 75). And in Hargovandas *v.* Bajebhai, I. L. R., 14 Bom., 222, where the vendor himself was in *actual* possession for about 12 years since the date of the deed of sale, it was held (though with some doubt) that his right to plead that the deed was void for fraud and want of consideration, was not barred by limitation. According to Ayyar, J. (I. L. R., 16 Mad., 315), if the party executing a fraudulent deed of sale is in possession of the property sold, the purchaser cannot acquire a valid title simply because the deed has not been set aside within three years. So long as the prior title of the seller is not extinguished under sec. 28 of Act XV of 1877, his right as plaintiff or as defendant to avoid such deed of sale by *confession and avoidance* is not affected by art. 91. (I. L. R., 16 Mad., 311, at pp. 314, 315). And in Orr *v.* Sundra, I. L. R., 17 Mad., 255, it has been held that it is open to the *defendants* (subsequent lessees of the zemindar) to raise the plea of fraud, although a suit by them to set aside the plaintiff's prior lease from the same zemindar would be barred by art. 91. It was pointed out in this case by Collins, C. J., and Shephard, J., that the proposition that a party *in possession* may be affected prejudicially by the law of limitation is unsound and cannot be maintained. Persons who have had *no occasion* to sue for *possession* of property cannot have their *right to property* extinguished by the lapse of three years under art. 91. This view of the law has been long since adopted in the Central Provinces. (See Baji Rav *v.* Har Pal, 1 Central Provinces L. R., 165.

Declaration of *benami*.

The question may arise as to whether a suit by the real owner of land against his benamidar for a declaration that the benami instrument of transfer is of no effect against him, is governed by art. 91. It has been held in the Central Provinces that such a suit is not affected by the provisions of art. 91, for cancellation of the deed is

not necessary to give the plaintiff the relief he seeks. (1 Cent. Prov. Rep., 165). See also I. L. R., 5 All., 322. A suit for a *declaration* that a deed of gift was nominally executed (by the plaintiff in favor of the defendant) and was not intended to take effect is not governed by art. 91. (Nagathal *v.* Ponnusami, I. L. R., 13 Mad., 44). See p. 729, *supra*. Where the benami transaction is tainted with fraud and the transaction has passed the inchoate stage, such a suit is ordinarily not maintainable. This question is fully discussed in Chinvirappa *v.* Puttappa, I. L. R., 11 Bom., 708.

Straight, J., on art. 91.

In Hazari Lal *v.* Jadaun (I. L. R., 5 All., 76), it was held by Straight, J., that "art. 91 is intended to apply to suits of the kind mentioned in sec. 39 of the Specific Relief Act, and to cases where a plaintiff seeks to have cancelled or set aside some instrument he has been induced by misrepresentation, concealment of facts, or other means of a like kind to enter into, or where the cancelment or setting aside of an instrument is the *only* relief asked." This opinion has been acted upon in several cases by the Allahabad Court. (See Ikram *v.* Intizam, I. L. R., 6 All., 260; Uma *v.* Kalka, I. L. R., 6 All., 75, and the cases cited therein). According to Stuart, C. J., art. 91 is not limited to the setting aside of instruments described in sec. 39 of Act I of 1877, but is applicable also to other instruments which, by reason of imperfect or invalid execution or of fraud, parties may have an interest in seeking to have set aside. A deed of gift purporting to have been executed by plaintiff's *predecessor* in estate cannot be directly or indirectly set aside on the ground that it was obtained by fraud, *after* the period allowed to such a plaintiff by art. 91. This view of the law appears to have been adopted by Straight, J., in Hasan Ali *v.* Nazo, I. L. R., 11 All., 456.

Stuart, C. J., (I. L. R., 5 All. 76).

Declaring a deed ineffectual as against plaintiff.

Where the object of the suit is not to have the instrument itself delivered up and cancelled, but to have it declared ineffectual in respect of the *plaintiff's* right in the property in suit, the article, it has been held, does not apply. (See Sobha *v.* Sahodra, I. L. R., 5 All., 322. See also I. L. R., 6 All., 260; I. L. R., 10 Mad., 213). In the first case (Sobha *v.* Sahodra), the instrument sought to be set aside purported to have been executed by a person who had *no* right to the property affected by it. In the second (Ikram *v.* Intizam) and in the third (Pachamuthu *v.* Chinnappan), the instruments impeached had been fraudulently executed by judgment-debtors of the plaintiff in favor of third parties.

Difference of opinion as to recovery of property.

But there has been much difference of opinion as to whether the article applies in cases where the plaintiff sues for *possession* of property by setting aside a spurious or invalid instrument. On this question, and other cognate questions arising under arts. 91—93, the reader is referred to two learned articles in 3 Mad. L. J., p. 335, and 4 Mad. L. J., p. 1.

Modes of evading the article.

Where the main and substantial relief sought is the recovery of possession of immoveable property, the suit, it has been held in some cases, is governed by the law of limitation applicable to such suits, and is not affected by the incidental question being raised whether the claim to possession can be defeated by the existence of an instrument in favor of the defendant, even where the plaintiff or the person under whom he claims was a *party* to such instrument. (See the opinion of Straight, J., in Hazari *v.* Jadaun, I. L. R., 5 All., 76, 77; Trilochun *v.* Nobokishore, 2 C. L. R., 10). The declaration of the invalidity of the *defendant's* pretensions is, in these cases, treated as no more than an *incidental* step in the assertion of the plaintiff's title and right to possession. (Ikram Sing *v.* Intizam Ali, I. L. R., 6 All., 260). The prayer for the invalidation of the instrument has, in some

Modes of evading the article.

of these cases, been treated as *surplusage*. (See Param *v.* Lalji, I. L. R., 1 All., 403, 409). In other cases, such a prayer has been treated as merely asking the Court to *prevent* the defendant from *setting up* the instrument as an answer to the suit. (Boo Jinatboo *v.* Sha Nagar, I. L. R., 11 Bom., 78, at p. 82). See also Nabab Mir *v.* Yasin Khan, I. L. R., 17 Bom., 755, where Sargent, C. J., and Candy, J., held that where the defendant *did not get into possession under the instrument* and only uses it to *defend* his position, art. 91 would not apply. On the other hand, cf. I. L. R., 12 Calc., 69 ; I. L. R., 15 Calc., 58, P. C. ; I. L. R., 12 Bom., 501 ; I. L. R., 11 All., 456 ; I. L. R., 19 Calc., 629.

Transfer by plaintiff's guardian.

Where the necessity of impugning the instrument arises from the defendant's using it to "guard his possession," to "defend his position," or to "resist the plaintiff's suit" for recovery of possession, plaintiff's prayer to set aside the instrument may be treated as *subservient* to the suit for possession, and as merely asking the Court to "prevent the defendant from setting up the instrument as an answer to the suit." This rule has been laid down in several cases as applicable to suits to recover possession of property in cases where the defendant relies upon a deed of transfer executed by the plaintiff's *guardian*. (Sikher *v.* Dulputty, I. L. R., 5 Calc., 363, at pp. 378, 385 ; Bhagvant *v.* Kondi, I. L. R., 14 Bom., 279, at p. 281 ; Nobab Mir *v.* Yasin, I. L. R., 17 Bom., 755, at p. 758). In Boo Jinatboo *v.* Sha Nagar, I. L. R., 11 Bom., 78, at p. 82, the principle of this rule was applied even to a suit for possession where the instrument impugned had been fraudulently obtained from the plaintiff himself.

Predecessor's transfer under which possession has been taken.

A executed a deed of gift of his property to B in 1875, and died in 1885 without taking any steps to have the deed set aside. A's heir, it has been held, cannot recover the property on the ground that the deed was procured by fraud and undue influence. The donee being in possession under the deed of gift, the deed must be set aside or cancelled before he may be dislodged. The necessity which rested upon the plaintiff for obtaining such cancelment is not obviated by his choosing to call the suit one for possession of immoveable property. (Hasan Ali *v.* Nazo, I. L. R., 11 All., 456. See also Raghubor *v.* Bhiku, I. L. R., 12 Calc., 69). It is otherwise where possession of the property did not pass *under* the fraudulent deed, and the transferee obtained possession *subsequently* by inducing the tenants to join him to defeat the plaintiff's title. (Per Best, J., in Sundaram *v.* Sithammal, I. L. R., 16 Mad., 311, at p. 316).

Shephard, J., on art. 91.

When a person seeks to recover property against an instrument executed by himself or by one under whom he claims, he must first obtain the cancellation of the instrument, and the three years' rule enacted by art. 91 applies to any suit brought by such person. Relief by way of cancelment of the instrument may be given even in cases where the instrument is on the face of it *void*, but cancellation is not absolutely necessary except in cases where the instrument is sought to be *avoided* on account of fraud or other such ground. An instrument of alienation executed by a person, who, *not* being the *full* owner of the property, has a *conditional authority* only to dispose of it, need not be set aside if the condition under which the authority might be exercised had not been fulfilled. Such are the cases of a sonless Hindu widow, the *kurta* or manager of a joint family, and the *karnavan* of a Malabar Tarwad. In these cases it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiff's interest is not affected by the instrument, and that declaration is merely *ancillary* to the relief which may be

Sales by persons having conditional authority.

granted by delivery of possession. The plaintiff may treat the instrument as non-existent, and sue for his right as if it did not exist. Even an express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. (See Unni *v.* Kunchi, I. L. R., 14 Mad., 26).

Instruments void as against the plaintiff.

If an instrument is, *ab initio*, void as against the plaintiff, by reason of its not having been executed by the plaintiff or by any person under whom he claims, or if the executant had no legal authority or competency to execute it, the plaintiff may treat it as a piece of waste paper. The existence of such an instrument can, in no way, obstruct the plaintiff's rights, and it is unnecessary for him to have that set aside, which has neither force nor effect. (See Hazari *v.* Jadaun, I. L. R., 5 All., 76, 78). Where plaintiff's *coparcener* purported to convey the *whole* property to a stranger, and the plaintiff sued for confirmation of possession by cancelment of the deed of conveyance, it was held that art. 91 did not apply to such a suit (Din Dial *v.* Har, I. L. R., 16 All., 73). Where a conveyance was executed by a guardian without authority, or where the guardian exceeded his authority in executing it, it was held that (under Act IX of 1871, when there was no article corresponding to art. 44 of this Act), it was not incumbent on the ward to sue to set it aside. He might sue to recover the property, and ask the Court merely to prevent the purchaser from setting up the conveyance as an answer to the suit. (See Sikhur *v.* Dulputty, I. L. R., 5 Calc., 363, 370, 385 ; see also Ramnausor *v.* Raghuber, I. L. R., 5 All., 490). West, J., approved the principle of the ruling in I. L. R., 5 Calc. (See Boo Jinatboo *v.* Sha Nagar, I. L. R., 11 Bom., 78, 82). And Sargent, C. J., adopted the principle of that ruling in I. L. R., 14 Bom., 279, and I. L. R., 17 Bom., 755.

Sale by co-parcener or by guardian.

Art. 91 does not preclude a plaintiff from availing himself of the longer period allowed for the recovery of immoveable property, provided the instrument in question may be declared *null and void* so far as his interests are concerned, leaving it to operate as between the parties thereto. This principle of the decision in Rughubhar *v.* Bhikya, I. L. R., 12 Calc., 69, and the decision in Pachamuthu *v.* Chinnappan, I. L. R., 10 Mad., 213, was applied by Collins, C. J., and Best, J., in Anantan *v.* Sankaran, I. L. R., 14 Mad., 101.

Void as against the plaintiff.

In Abdul Rahim *v.* Kriparam (I. L. R., 16 Bom., 186, at p. 189), Birdwood and Parsons, JJ., say : "It is now, we think, fully settled that arts. 91, 92 and 93 apply only to suits brought *expressly* to cancel or set aside or declare the forgery of some instrument (as in the Privy Council case Janki *v.* Ajit, I. L. R., 15 Calc., 58), and that they do not apply to suits where substantial relief is prayed and where the cancellation or declaration is subservient or merely ancillary and *not necessary* to the granting of such relief." West, J. (I. L. R., 11 Bom., 78) and Ayyar, J., appear to be of the same opinion (I. L. R., 16 Mad., 311). But see I. L. R., 11 All., 456, and I. L. R., 19 Calc., 629.

Birdwood, J., on arts. 91—93. Express prayer for cancelment.

If a person not having any title to an estate sells or mortgages it, the true owner of the land is not bound to bring an action directly the deed is executed. He might very reasonably say—"Why should I be obliged to incur the costs and harassment of a suit when the property remains in my possession ? It will be time enough for me to interfere when my possession is interfered with." He would not be bound to bring a suit to set aside the deed. Besides, the right to set aside the deed is a distinct right from the right to recover possession. (See Raja Ram *v.* Luchman, 8 W. R., 15, 22, F. B.) A deed made between plaintiff's ryot and an indigo-planter cannot, in the slightest degree, affect the rights of the plaintiff, and where the plaintiff was no party to it, it was held by Jackson and White, JJ.,

Alienation without any title.

that he was not entitled to sue to set it aside. (See Baboo Luchmee Prosad *v.* Sulhab Roy, 1 Shome, 43). But whether entitled or not, he is, at all events, not bound to sue.

In Bhawani Prasad *v.* Bisheswar (I. L. R., 3 All., 846), Straight and Duthoit, JJ., applied the provisions of art. 91 to a suit for possession of land by cancelment of a perpetual lease executed by a Hindu widow, who, it was alleged by other members of her family, had no proprietary title to the land. It was held that art. 91 governed suits by such parties to have such an instrument cancelled or set aside. In a later case (Ikram *v.* Intizam, I. L. R., 6 All., 260), it was said, that "the relief sought for by the plaintiffs" in Bhawani Prasad's case "was impossible of attainment without getting rid of the lease given by the former proprietor." But it may be observed that the plaintiff in that case denied the widow's title and competency to execute the lease.

Husband's will propounded by Hindu widow and remainderman.

Where a Hindu widow propounded a will of her late husband which purported to devise a life interest in his property to the widow, and the remainder to a distant relative, and where that relative again set up the will and took possession of the property on the death of the widow, it was held that a suit by the reversionary heir for possession of the property was barred under art. 91 by the lapse of three years from the widow's death. A suit by the predecessor in estate of the plaintiff to set aside the will during the lifetime of the widow had been dismissed by the High Court on the ground that it was premature. (Mahabir Pershad *v.* Hurrihur, I. L. R., 19 Calc., 629). A deed of gift executed by a person having full disposing power over his property, under which possession was taken by the donee, cannot even, in a suit for possession, be set aside on the ground that it was procured from the donor by fraud and undue influence, if the donor or his heir has allowed more than three years to elapse from the time when the facts entitling the plaintiff to have the deed set aside become known to him. (Hasan *v.* Nazo, I. L. R., 11 All., 456). In these last two cases, Straight and Brodhurst, JJ., and Prinsep and Amir Ali, JJ., relied on the analogy afforded by suits to set aside an adoption, and the observations of their Lordships of the Privy Council on that class of suits. (See I. L. R., 11 All., 456, at p. 459, and I. L. R., 19 Calc., 629, at p. 634).

Pedecessor's gift, with possession.

When time begins to run.

In a suit under art. 91, the date of the execution of the instrument is not the date from which limitation runs. The plaintiff must be entitled to have the instrument cancelled or set aside, and the facts which so entitle him must be known to him. Time does not commence to run until the plaintiff, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit. A judgment-creditor has no *locus standi* in any Court to sue to set aside a benami or collusive deed of sale executed by the judgment-debtor, until he (the creditor) has reason to believe that the decree cannot be otherwise satisfied (Tawangar *v.* Kura Mal, I. L. R., 3 All., 394). In this case it was assumed that art. 91 was applicable to it; but cf. I. L. R., 10 Mad., 213; I. L. R., 5 All., 322; I. L. R., 6 All., 260. See pp. 729, 732, *supra*.

In a suit to set aside a sale, by A (the vendor) and B (a donee of A by a subsequent deed of gift) limitation runs from the date of A's knowledge of the facts. (Janki *v.* Ajit, I. L. R., 15 Calc., 58, P. C.)

The title to impeach an instrument does not accrue until it becomes operative in law. A gift by a Mahomedan, not accompanied by possession, is inoperative, and limitation under this article does not run until possession is taken by the donee (Meda Bibi *v.* Imaman Bibi, I. L. R., 6 All., 207, F. B.).]

92.—To declare the forgery of an instrument issued or registered.	Three years	...	When the issue or registration becomes known to the plaintiff.	Art. 92.

[No. 92. (No. 93, Act IX). See notes to arts. 91 and 93.

Suits under this and the following article are, like suits under arts. 118 and 119, merely declaratory suits, that is, suits having declaratory conclusions only. But a suit to *set aside* a deed which is impugned as a forgery, has been held to be a "suit to *declare* the forgery of an instrument" within the meaning of the corresponding article of Act IX of 1871. (Fakharuddin *v.* Official Trustee, I. L. R., 8 Calc., 178, at p. 188, P. C.) A suit for possession of property, or even for declaration of right to property, is not governed by arts. 92 and 93, although the defendant relies upon an instrument, which the plaintiff impugns as a forgery. Even if the plaintiff incidentally asks the Court to set aside the instrument, the three years' limitation will not apply (Trilochun *v.* Nobokishore, 2 C. L. R., 10; Nistarinee *v.* Anundmoyee, 2 C. L. R., 561). See also Abdul *v.* Kriparam, I. L. R., 16 Bom., 186, 189. The prayer for setting aside the forged instrument may be treated as a prayer for an *ancillary* declaration that the instrument is forged, and therefore void. If the alleged executant of a forged instrument of transfer is in possession of the property which the instrument purports to convey, and he does not care to bring a suit to declare the forgery of the instrument within the time allowed, the transfer does not and cannot become valid and legally enforceable by reason of this lapse of time. (See Sundaram *v.* Sithammal, I. L. R., 16 Mad., 311, at p. 315). In Abdul *v.* Shaluka (I. L. R., 21 Calc., 496, at p. 500, P. C.), the plaintiff's suit for possession was decreed, although it had been instituted five years and a half after the date of a false deed of relinquishment purporting to have been executed by the plaintiff in favor of the defendant. It was argued by Mr. Arathoon that the suit not having been brought within three years from the time when the existence of the false deed had become known to the plaintiff, her suit was barred by art. 92. But their Lordships of the Privy Council did not take any notice of this contention. It should be remarked, however, that it does not appear from the report when the existence of the deed became known to the plaintiff. It has been held by Sargent, C. J., that if an alleged registered deed of sale relied upon by the defendant is found not to have been executed at all, the owner's suit for *possession* of the property is not governed by arts. 91 and 92, although the plaint contains a subsidiary prayer for the cancellation of such deed. (See Nabab Mir *v.* Yassin Khan, I. L. R., 17 Bom., 755, at p. 758). But a suit brought simply for the purpose of setting aside an alleged forged hibanamah purporting to have been executed by plaintiff's wife and creditor is barred by the three years' limitation (Fakharuddin *v.* The Official Trustee, I. L. R., 8 Calc., 178, P. C.)

Suit for possession.

Simple declaration of forgery.

Under Act IX, the date of the issue or registration was the starting point of limitation. Under the present Act, limitation does not run until the issue or registration becomes *known* to the plaintiff. If the issue is known before the registration is known, time runs from the date of the knowledge of the issue. (Shephard, 120).]

Starting point.

93.—To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years	...	The date of the attempt.	Art. 93.

[No. 93. (No. 93, Act IX). See notes to No. 92.

Where art. 144 applies.

Where plaintiff sued for recovery of possession of land against his manager, and incidentally prayed that a forged deed of sale on which the defendant relied might be cancelled, it was held that if the deed was forged and had not been executed at all, art. 144 (not arts. 92, 93) applied to the case. (Nabab Mir *v.* Yasin Khan, I. L. R., 17 Bom., 755, 758).

If the suit is merely for a declaration of the forgery of an instrument, which was to the plaintiff's knowledge registered, and which was also attempted to be enforced against the plaintiff more than three years ago, it will be barred by limitation both under this and the preceding article. (See Fakharuddin *v.* The Official Trustee, I. L. R., 8 Calc., 178, at p. 188, P. C.) Under this article, it is necessary that the defendant should have attempted to enforce the instrument against the plaintiff.

Attempt.

It is not necessary that the person who is to profit by the instrument should seek to obtain the entire fruits of it. It is quite enough if he seeks to place himself in an advantageous position, which, but for the instrument, he could not occupy. Limitation runs from the first attempt. (Fakharooddeen *v.* Pogose, I. L. R., 4 Calc., 209).]

Art. 94.	94.—For property which the plaintiff has conveyed while insane.	Three years	... When the plaintiff is restored to sanity, and has knowledge of the conveyance.

[No. 94. (No. 94, Act IX). The suit under this article is not a suit merely to set aside a conveyance, but for the property conveyed. Compare art. 44.]

Art. 95.	95.—To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years	... When the fraud becomes known to the party wronged.

[No. 95. (Nos. 95 and 96, Act IX; sec. 10, Act XIV). See pp. 614—618.

A regular suit, directly to set aside a decree obtained by fraud, is one of the three remedies for obtaining relief in such cases. (See I. L. R., 10 Calc., 357; I. L. R., 10 Calc., 642; I. L. R., 16 Mad., 198).

A decree obtained by the fraud or collusion of *both* the parties cannot ordinarily be set aside by any one of them (Ahmedbeg *v.* Cassumbhy, I. L. R., 6 Bom., 703; Chenvirapa *v.* Puttappa, I. L. R., 11 Bom., 708).

The knowledge of fraud predicated by the terms of art. 95 is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court (Natha Sing *v.* Jodha Sing, I. L. R., 6 All., 406). *Partial* knowledge of the fraud is not sufficient, specially where the defendant prevents the plaintiff from acquiring full knowledge. (Rahmubhoy *v.* Turner, I. L. R., 14 Bom., 408, at pp. 415, 427; I. L. R., 17 Bom., at p. 347, P. C.)

Knowledge of fraud.

Where the right to sue, or the title upon which it is founded, or any document necessary to establish such right, has been fraudulently concealed by the defendant, sec. 18 applies. In the absence of such *fraudulent concealment*, the latter part of art. 95 provides a period of limitation in extension of the period which would, under some

other article, apply to a suit, and not a period less than what, under ordinary circumstances, is allowed for bringing a suit of the same nature. (Opender *v.* Gudadhur, 25 W. R., 476). It certainly could not have been intended that, whereas, in an ordinary case, the plaintiff would be allowed twelve years to bring a suit for possession, the period of limitation should be cut down to three years, because, in addition to wrongful possession on the part of the defendant, there had been a gross and carefully concocted fraud. (Chunder *v.* Tirthanund, I. L. R., 3 Calc., 504; see also Umasankaran *v.* Kalka, I. L. R., 6 All., 75, 77). When art. 95 does not apply

The expression "relief on the ground of fraud" may mean *any* relief (not merely *specific* relief under Act I of 1877) on the ground of fraud. But the word "other" preceding that expression and the context shew that the "relief" referred to in this article must be of the same nature or kind as the setting aside of a decree on the ground of fraud (see p. 177, *supra*). The latter part of this article, it has been said, has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed or do some act, and desires to be relieved from the consequences of those acts. Chunder *v.* Tirthanund, I. L. R., 3 Calc., 504). A suit for *possession* by setting aside a fraudulent and benami sale is *not* a suit for "relief on the ground of fraud." (I. L. R., 6 All., 75, at p. 78). What "relief" covered by art. 95.

Fraud, as a *substantive* cause of action, gives the person defrauded the right to sue for damages, which actually result from such fraud. In an action of deceit for compensation in damages, there is no cause of action without both fraud and actual damage. And as there is no actionable fraud without proof of actual damage, that is, of harm or loss on which an appreciable money-value can be set (an action of deceit for *nominal* damages being unknown), sec. 24 of the Limitation Act will affect the starting point of limitation. (See Pollock on Torts, 3rd Ed., 257; Pollock's Tagore Law Lectures, pp. 22, 25; Gibbs *v.* Guild, 8 Q. B. D., 296, at p. 301). Sec. 10, Act XIV of 1859, provided that where the cause of action itself was *founded on fraud*, limitation should commence to run from the time at which such fraud should have been first *known* by the party wronged. Under sec. 18 of Act XV of 1877, if the cause of action or right to sue, in an action of deceit, has been *fraudulently concealed* by the defendant, time will commence to run from the date when such fraud first became known to the plaintiff. (See Gibbs *v.* Guild, 8 Q. B. D., 296; 9 Q. B. D., 296). An action of deceit being a suit for *compensation* in damages for a tort (and not for any relief *ejusdem generis* with the setting aside of a decree on the ground of fraud) is, it is apprehended, governed by art. 36 of Act XV, read with secs. 18 and 24. It has been held in Calcutta that a suit to recover a specified sum of money which the plaintiffs have had to pay to their creditor in consequence of the defendant's fraudulently receiving the money from the plaintiffs and not paying it over to such creditor is not a suit to obtain relief on the ground of fraud within the meaning of art. 95, but is governed by art. 61. (Torabali *v.* Nilrutton, I. L. R., 13 Calc., 155). See also Raghumoni *v.* Nilmoni, I. L. R., 2 Calc., 393; p. 699, *supra*. But the Punjab Chief Court have applied art. 95 to a suit for the value of goods delivered to the defendant on his fraudulently representing himself as the agent of the plaintiff's creditor. (Budha Sing *v.* Hira, Punj. Rec., No. 19 of 1878, cited by Mr. Rivaz under art. 95). See also I. L. R., 6 Mad., 344. Fraud as a substantive cause of action. Limitation for an action of deceit. Suit for a sum of money.

In a suit to set aside a public sale brought about by fraud, the Allahabad High Court said: "Fraud vitiates all things, and prevents the application of any other rule of limitation than that specially

Where art. 95 applies.

provided for relief from its consequences in art. 95." (Natha Sing *v.* Jodha Sing, I. L. R., 6 All., 406). And the Bombay High Court held that art. 95 (not art. 144) applies to such a case (Bojajie Birchand, I. L. R., 13 Bom., 221). It has been held by a Division Bench of the Madras High Court that where the Collector orders compensation-money to be given to the defendant through fraud on his part, a suit for the payment of the money to the party entitled is governed by art. 95. (Venkata *v.* Krishna Sami, I. L. R., 6 Mad., 344). It has, on the other hand, been held that where the main and substantial relief prayed for is the assertion of the plaintiff's right to property, such as recovery of possession or declaration of title, art. 95 is inapplicable. (See Umashankar *v.* Kalka Prasad, I. L. R., 6 All., 75, and Burjorji *v.* Dhunbai, I. L. R., 16 Bom., 1, at pp. 8, 9, 10). Where, in a private partition of family property, a minor member was represented by a person who was not his guardian, and the partition was not at all binding on the minor, the minor's suit for possession of his legal share notwithstanding the fraudulent partition was held to be governed by the 12 years' limitation. (See Lal Bahadur *v.* Sispal, I. L. R., 14 All., 498). A suit for breach of contract to indemnify against the fraud of a *third* party (and not for relief on the ground of defendant's fraud) is not governed by this article. (Shapurji *v.* The Superintendent, 12 Bom., 238). Where the suit is not to obtain relief on the ground of fraud or mistake, but to recover a specified sum of money which the plaintiffs have had to pay to their creditor in consequence of the defendant's fraudulently receiving the money from the plaintiffs, and not paying it over to such creditor, art. 61 (not art. 95 or 96) appears to be most applicable. (Torabali *v.* Nilrutton, I. L. R., 13 Calc., 155). Notwithstanding the ruling in Venkatapathe *v.* Subromonia (I. L. R., 9 Mad., 457), it has been recently held by a Full Bench of the Madras High Court that a suit to set aside a sale for arrears of revenue on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers is governed by the special rule of limitation provided by the Madras Revenue Recovery Act, II of 1864, modified by the provisions of sec. 18 of Act XV of 1877, and not by art. 95. (Venkata *v.* Chingadu, I. L. R., 12 Mad., 168). See notes to art. 12.

Act XIV of 1859.

A suit to obtain possession by setting aside a decree obtained by fraud was, under Act XIV, held to be governed by the six years' rule of limitation. (Mussamut Jhisoman *v.* Babu Roup Narain, 6 W. R., 165).

Onus.

If a suit is *primâ facie* within the time allowed by this article, it is for the defendant to prove the contrary. If the defendant alleges that knowledge of the fraud was acquired by the plaintiff at a period earlier than that alleged by the plaintiff, the defendant must prove his own allegation. (I. L. R., 6 All., 406, 407; I. L. R., 17 Bom., 341, P. C.; p. 616, *supra*). As to knowledge and means of knowledge of fraud, or of direct and *constructive* knowledge of fraud, see Nilmoni *v.* Nilu, I. L. R., 20 Calc., 425, and pp. 231, 615, 616, *supra*.

Art. 96.	96.—For relief on the ground of mistake.	Three years	... When the mistake becomes known to the plaintiff.

[No. 96. (No. 97, Act IX). According to a Division Bench of the Madras High Court (see Venketa *v.* Krishna Sami, I. L. R., 6 Mad., 344), the mistake spoken of in this article is not confined to the mistake of *private* parties, so that money awarded to the defendant

by the Collector's mistake may be sued for under this article. It has been held by the Calcutta High Court that this article applies to a suit to recover money paid by mistake (Muthura *v.* Debendra, I. L. R., 12 Calc., 533 ; and p. 699, *supra*). But this article was intended to refer to suits which might have been brought in the Court of Chancery, and not to the common law action of money had and received. (Stokes' Anglo-Indian Codes, Vol. II, p. 988). Mr. Shephard, however, points out that as a person may, without any negligence on his own part or any fraud on the part of the other party, remain in ignorance of his having made a payment which is wrong altogether, or excessive, the application of art. 62 to such cases would often operate very hardly. (Shephard, 2nd Ed., p. 31). Money paid by mistake.

Art. 97 of Act IX referred to "mistake in fact." This article applies to both mistakes in fact and in law. There are cases in the Courts of Common Law in which it has been held that money paid under a mistake of law cannot be recovered. In equity, the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn, and there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake. (Daniel *v.* Sinclair, 6 App. Cas., 181, 190). See also Story's Eq. Juris., by Grigsby, sec. 137, p. 81. An error of law does not vitiate a contract or conveyance in British India (Vishnu *v.* Kasinath, I. L. R., 11 Bom., 174). Mistake "in fact" and "in law."

The phrases "ignorance of facts" and "mistake of facts" are commonly used as equivalent in legal discussions. (See Story's Equity Jurisprudence, 12th American Edition, sec. 140, note).

Neither art. 95 nor art. 96 applies to a minor's suit for possession of his share of joint family property which appears to have been partitioned in a proceeding in which the minor was not properly represented. (Lal Bahadur *v.* Sispal, I. L. R., 14 All., 498)].

97.—For money paid upon an existing consideration which afterwards fails.	Three years	... The date of the failure.	Art. 97.

[No. 97. (No. 98, Act IX). According to English law, this is a case of money had and received for the plaintiff's use. (See notes to arts. 62 and 87). Where goods, which have already been paid for, are afterwards found to be short delivered, the failure of consideration takes place on the date of the short delivery, and not on the date of payment, or the date when the short delivery is found out by the plaintiff. (Atul *v.* Lyon, I. L. R., 14 Calc., 457). Case of short delivery.

A failure of consideration may not become apparent to a vendee until a suit for possession is brought and fails. But the failure may nevertheless be a failure from the *beginning*, if the purchase is *void* under the law. (Honuman *v.* Honuman, I. L. R., 15 Calc., 51). The purchase-money in such a case would be recoverable in a suit to which art. 62 applied. This general rule is unquestionably correct, but the Calcutta High Court applied the rule to a sale of a share of joint family property by one member of a joint family (under the Mitakshara or Mithila Law) which they held was void *ab initio*. Their Lordships of the Privy Council, however, held that such a sale was only *voidable* under the Mitakshara or Mithila Law, that art. 97 did apply to a suit for a refund of the consideration for such a sale, and that the three years Void and voidable sales.

were to be counted from the date when the purchaser being opposed by other members of the family found himself unable to take possession of the share purchased. (Hanuman *v.* Hanuman, I. L. R., 19 Calc., 123, P. C.) See p. 700, *supra*. Where in a suit for specific performance by the intending vendor it was declared that no effectual agreement had been made, the date of the decree was held to be the date when the consideration failed, and any money which the intending vendor had received under the agreement was recoverable within three years under art. 97. (Bassakur *v.* Dhum Sing, I. L. R., 11 All., 47, P. C. See the last note to art. 64).

Agreement declared ineffectual.

It has been held in the Central Provinces that art. 97 does not apply to a case where the sale transaction being a fictitious one the consideration failed *ab initio*. (Har Pal *v.* Narayan, 3 Cent. Prov., L. R., 178). In this case the vendee had previously brought a suit for declaration of his proprietary right, but his suit was dismissed, and it was suggested by the Court that he might sue for the recovery of the alleged consideration-money. The vendee accordingly brought a suit for the consideration-money, and urged that art. 97 applied to his case.

Art. applied to contracts and transfers only.

Where certain monies had been drawn out of Court under a decree—and such decree was subsequently reversed, it was held that that was not a case of a *contract* in which the *consideration* had failed within the meaning of sec. 97. (Narayan *v.* Narayan, I. L. R., 13 Mad., 437).

A suit by a pre-emptor (or his assignee) for recovery of the amount paid by him under a decree of the first Court, on the ground that such decree was modified, and the modified decree subsequently became void by lapse of the period allowed by the Appellate Court for its execution, is a suit to which art. 97 may apply. (Kojiram *v.* Ishar Das, I. L. R., 8 All., 273). Here the consideration for the payment failed *after* the date of payment. It was observed in this case that if art. 97 did not apply to it, art. 120 would.

Where a mortgage security comes to an end by reason of the mortgagor's default in paying the Government revenue, the mortgagee may sue the mortgagor personally for a re-payment of the money advanced by him within three years of the date when the mortgage consideration for the loan failed. (Sawaba *v.* Abaji, I. L. R., 11 Bom., 475).

It has been held that the limitation for a suit to recover money paid to the defendant in consideration of an agreement that the defendant's brother should not execute his decree where such agreement has been broken, is that provided by art. 97. (Branson's Digest of Unreported Bombay Judgments, 219).]

Art. 98.	98.—To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	... The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.

[No. 98. (No. 99, Act IX; sec. 2, Act XIV). The breach of trust is committed by the trustee before his death, but the suit under this article is brought after his death. (See notes to sec. 10).

The suit under this article is not for the recovery of the trust-property, but for compensation for loss. There is no express provision for suits during the lifetime of the trustee for such loss. Compare sec. 2, Act XIV of 1859, and see Thackersey *v.* Hurbhum,

I. L. R., 8 Bom., 432, 469, cited at p. 596, *supra*. As to the liability for breach of trust, see sec. 23, Act II of 1882. A breach of trust depends upon the neglect of some special duty undertaken in regard to some specified person or body of persons. Liability arising from the neglect of a public duty lies with the *person*, but liability arising from a breach of trust follows the trustee's *estate* after his death. His estate is liable, although it has derived no benefit from the breach of trust. (New Fleming S. and W. Co. *v.* Kissonji, I. L. R., 9 Bom., 373, at pp. 389, 399). According to Scott, J., the word "loss" in art. 98, means the loss of the specific property mentioned in sec. 10. If the specific property is irrecoverable, then its value can be recovered out of the general estate of the deceased trustee. (*Ibid.*, p. 400). But this article apparently applies to *any* loss occasioned by *any* breach of trust, whether fraudulent or not. Under the English Trustee Act of 1888, the trustee or his representative may plead limitation only if he is *not* guilty of any *fraud* or a *fraudulent* breach of trust. (Lewin, 9th Ed., p. 1009).] Loss.

99.—For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	Three years	... The date of the plaintiff's advance in excess of his own share.	Art. 99.

[No. 99. (No. 100, Act IX). Under Act XIV of 1859, the six years' rule applied to suits for contribution. (Doorga *v.* Doorga, 2 W. R., 266; Nobokristo *v.* Rajballubh, 3 W. R., 134).

Money realized by the *sale* of plaintiff's property in execution of a joint decree against the plaintiff and the defendant is, perhaps, not money *paid* within the meaning of this article. (See Fuckorudin *v.* Mohima, I. L. R., 4 Calc., 529). But it is hardly possible that the Legislature intended that the plaintiff suing for contribution, in such a case, should have a longer period. The payment must be in excess of the plaintiff's *share* before limitation runs under this article. (Suput *v.* Imrit, 6 C. L. R., 62; I. L. R., 5 Calc., 720. See also Ram Pershad *v.* Neerbhoy, 11 B. L. R., 76, at pp. 81, 82). But the language of the article does not apply where one of the joint-debtors or co-sharers has paid something in excess of his share, and not the *whole* of the amount due. Art. 61 is probably applicable to such cases. Paid or advanced. Whole amount.

The date when the money is actually paid to the decree-holder, not the date when it is offered or ordered to be paid, is the date from which limitation runs. (Radha *v.* Rupchunder, 3 C. L. R., 480).

A suit for the recovery of money paid by an under-tenant or a mortgagee, to protect the estate from sale for arrears of revenue, is not governed by this article. (Ram Dutt *v.* Hurkh, I. L. R., 6 Calc., 549). If no lien or charge on land is created by such payment, art. 61 will probably apply to such a suit.

But as to whether there is any lien or charge for the amount of monies in respect of which a right to contribution arises, see the notes to art. 132, and Achut Ram *v.* Hari Kamti, I. L. R., 11 Bom., 313; Kinuram *v.* Muzaffer, I. L. R., 14 Calc., 809, F. B., and Sheshagiri *v.* Pichu, I. L. R., 11 Mad., 452. Following the opinion of the *Personal* liability, or *charge*.

majority of the Judges in Kinuram's case, it has been held in Calcutta that a suit against a co-sharer for recovery of money paid by the plaintiff to protect a joint estate from sale for arrears of revenue can no longer be treated as a suit for money charged upon land, and that such a suit is governed by art. 99. (Khublall *v.* Pudmanund, I. L. R., 15 Calc., 542). Two separate plots of land separately assessed but covered by the same towzi number may be treated as a joint estate. (*Ibid.*) See notes to arts. 82 and 132.

Where the payment is on account of *rent* (and not of *revenue*) payable by the plaintiff and defendant jointly, art. 61 (not art. 99) would seem to be applicable. But in Thanika *v.* Shuda, I. L. R., 15 Mad., 258, art. 99 was applied to payments on account of rent.

Other suits for contribution.

Suits for contribution against the estate of deceased co-trustees are governed by art. 100. Suits for contribution against co-sureties are governed by art. 82. Suits for contribution by the manager of a joint estate come under art. 107. Other suits for contribution (*e. g.*, by a sharer in a joint under-tenure) may fall within the terms of art. 61. The contribution called *general average* is not provided for in any of these articles.]

Art. 100.	100.—By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years ...	When the right to contribution accrues.

[No. 100. (No. 101, Act IX; sec. 2, Act XIV). This article does not apply where the trustee who is liable to contribute is not dead. As to contribution between co-trustees, see sec. 27, Act II of 1882. A suit under art. 98 against the estate of a deceased trustee is *not* a suit for contribution by a co-trustee. It is a suit by the *cestui que trust* for *compensation* for loss occasioned by a breach of trust.]

Art. 101.	101.—For a seaman's wages.	Three years ...	The end of the voyage during which the wages are earned.

[No. 101. (No. 102, Act IX). Compare art. 7. Seamen, as opposed to watermen, are persons engaged in navigating ships, &c., upon the *high seas*. To obviate disputes between master and seamen, to secure obedience to orders, and to interest the seamen in the voyage, their earnings are made to depend on the termination of the voyage. (Wharton). See Act I of 1859 and Act XIII of 1878. This article applies to suits, and not to summary proceedings, for recovering seamen's wages. (Starling, p. 151).]

Seamen's wages.

Art. 102.	102.—For wages not otherwise expressly provided for by this schedule.	Three years ...	When the wages accrue due.

[No. 102. Arts. 4, 7, and 101 expressly provide for suits for wages in three special classes of cases. In ordinary language the term wages is usually restricted to the remuneration for mechanical or muscular labor, specially to that which is ordinarily paid at short intervals. Correctly speaking, wages *include* the fees of professional men, the salaries of public functionaries, and the pay of military and naval men. (Ogilvie's Imp. Dictionary). In Stroud's Judicial Dictionary the term "wages" as *distinguished* from "salary" is said

Wages and salary.

to be applicable to the "personal earnings of labourers and artisans;" but as suits for the wages of household servants, artisans and labourers have been already provided for by art. 7, it is apprehended that the "wages" referred to in art. 101 are "wages" of servants not being household or domestic servants. Workmen who work by the piece, and are not hired for a specific time, are not servants. (Smith's Law of Master and Servant, 4th Ed., 216).

Wages due to an employé leaving his employer's service would be due on the date when he left the service, and any suit for those wages must, in the absence of any subsequent account stated between the parties, be brought within three years from such date. (Young *v.* MacCorkindale, 19 W. R., 159).] Leaving service.

103.—By a Muhammadan for exigible dower (*mu'ajjal*).	Three years ...	When the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce.

Art. 103.

[No. 103. (No. 103, Act IX). There is nothing in this article which prevents a Muhammadan wife from suing for exigible dower without a previous demand. (See Ameeroonnissa *v.* Mooradoonnissa, 6 Moo.'s I. A., 211). Prompt or exigible dower is a debt always due and demandable, and payable on demand. But the principle of arts. 59 and 73 is not applicable to suits for exigible dower. The wife is not bound to sue immediately or make any demand during the life-time of her husband. Prompt or exigible dower may be, but need not necessarily be, exacted immediately, and limitation in respect of it does not run against the wife so long as the marriage exists, except where the wife demands such dower and is refused. (See Mussamut Mulluka *v.* Mussamut Jumula, L. R., Sup. Vol., I. A., 135; 11 B. L. R., 375). A clear and unambiguous demand and refusal set time running against the wife, even during the continuance of the marriage. A previous unsuccessful application by the wife to sue her husband *in formâ pauperis* for her dower (though such application was opposed by the husband, who denied his liability to pay the dower), does not amount to a demand within the meaning of this rule. (Ranee Khajooroonnissa *v.* Ranee Ryusoonissa, 15 B. L. R., 306, P. C.; 24 W. R., 163). Demand and refusal as regards a portion of the dower does not set time running as regards the remainder. (Begoo Jaun *v.* Gashee, 6 W. R., Civ. Ref., 19). See notes to art. 104.] Cause of action for exigible dower.

104.—By a Muhammadan for deferred dower (*mu'wajjal*).	Three years ...	When the marriage is dissolved by death or divorce.

Art. 104.

[No. 104. (No. 104, Act. IX). Where it is not expressed whether the payment of the dower is to be prompt or deferred, the whole is due on demand. Where the dower is merely described as *mu'wajjal*, or deferred, and there is no express stipulation as to the time before which it shall not be demandable, the question whether it must be presumed to be payable on the dissolution of the marriage by the death of either the husband or the wife, or whether it becomes demandable only on the death of the husband, is one which cannot be

said to be free from doubt. (Mirza Bedar *v.* Mirza Khurrun, 19 W. R., 315, P. C.) Limitation, under *this* article, runs from the dissolution of the marriage by divorce, or by the death of *either* the husband or the wife.

If dower is payable under a duly registered kabinnamah, art. 116 will apply. (See Amani *v.* Mir Moher Ali, 2 B. L. R., 306). Where it is sought to charge the dower on immoveable property, art. 132 may apply. See Janee Khanum *v.* Amatool, 8 W. R., 51.]

Art. 105.	105.—By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Three years ...	When the mortgagor re-enters on the mortgaged property.

[No. 105. (No. 105, Act IX). Under Act IX, time commenced to run from the date of the receipt by the mortgagee. (See Jaijit *v.* Govind, I. L. R., 6 All., 303, at p. 311). A mortgagee remaining in possession after the mortgage has been satisfied is not a trustee (sec. 3). Under Act XV of 1877, a suit to recover, as against such a person, whatever may be found due upon a balance of accounts from the commencement of the mortgage, is not barred, if it is instituted within three years of the date when the mortgagor gets back the possession of the mortgaged property. See cl. (*h*), sec. 76, Act IV of 1882. Compare Baboo Lall *v.* Jamal Ali, 9 W. R., 187, F. B.]

Art. 106.	106.—For an account and share of the profits of a dissolved partnership.	Three years ...	The date of the dissolution.

[No. 106. (No. 106, Act IX). The nature of a suit under this article, and of an application under sec. 265 of the Contract Act was discussed by Straight, J., in Harrison *v.* The Delhi and London Bank, (I. L. R., 4 All., 437). Where the plaintiff prays, that the accounts of a partnership may be taken, that a liquidator may be appointed to wind up the affairs of the partnership, and that (after realization of the assets and satisfaction of the liabilities) the partners may severally be decreed in a certain proportion each of what remains, the suit has a wider scope, and is not governed by this article, but by art. 120. (I. L. R., 4 All., 437). In the absence of any contract to the contrary, partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner; and if, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members. (Sec. 253, Act IX of 1872). The winding-up of a partnership is the taking by the Court into its own hands the settlement of the partnership concerns. A suit for dissolution of a partnership has always been cognizable by the ordinary Civil Courts. (Ramjiwan *v.* Chand Mal, I. L. R., 7 All., 227, F. B.) Suits under sec. 265 of the Contract Act, are now cognizable by Munsiffs and Subordinate Judges. (See Act IV of 1886). This article does not apply until the partnership has been dissolved. Indeed, "so long as a partnership continues existing, and each partner is in the exercise of his rights and the enjoyment of his property, the Statute Law of Limitation has no application at all between the partners." (Banning, 204). But as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the Statute begins to run. (Lindley on Partnership, 5th Ed., p. 510; Noyes *v.* Crawley, 10 Ch. D., 31, at p. 39). In

Dissolution and winding-up.

When Statute runs.

a suit for an account instituted by the executor of a deceased partner, where the surviving partner had continued the partnership business, and had got in outstanding assets within the period of limitation, but where the right of the executor had never been recognised, it was held by the House of Lords, that the suit not having been brought within the period of limitation (six years in England) was barred by the Statute. (Knox *v.* Gye, L. R., 5 H. L., 656; Lindley, p. 510). A member of a subsisting partnership cannot sue his co-partners for profits which had accrued up to a *particular* time, but must sue for a general account. (Doyaram *v.* Sookhanum, 16 W. R., 141; see also Kalee Churn *v.* Ram Lall, 21 W. R., 300). Actions between partners which involve the taking of partnership accounts prior to dissolution are almost unheard of. (Kassi *v.* Gopee, I. L. R., 9 All., 120). Suit by deceased partner's executor.

Part owners of a ship are not properly speaking partners at all. (I. L. R., 9 All., 120, at p. 123). A suit for an account and share of the family estate by a member of a joint Mitakshara family is not governed by art. 106 or by art. 109. (See Prithe Pal *v.* Jowahir Singh, I. L. R., 14 Calc., 493, at p. 509, P. C.) Suits to which this art. does not apply.

A suit on an adjusted partnership account is a suit on "an account stated," and is not governed by this article. (See Nobin *v.* Suroop, 6. W. R., 328). As to what is a partnership demand, see MacCorkindale *v.* Young, 18 W. R., 466. Adjusted accounts.

A suit for an account, such as is mentioned in this article, was formerly governed by the six years' rule under sec. 1, cl. 16, Act XIV of 1859. (Kalee Kristo *v.* Haran, 19 W. R., 277).

This article has no bearing upon the question how far the account should be carried back. The time from which the account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure. (Lindley on Partnership, 5th Ed., p. 519). For, to an action for an account of partnership dealings and transactions, an account thereof already stated and settled between the parties affords a good defence. (Lindley, p. 512). The time at which an account of partnership dealings and transactions is to stop, will be the date of the dissolution of the firm, but the account must still be kept open for the purpose of debiting and crediting the proper parties with the monies payable by or to them in respect of fresh transactions incidental to the *winding up*, as well as in respect of old transactions engaged in prior to the dissolution. (Lindley, p. 520). How far accounts may be carried back.

In a suit for adjusting the account between two co-owners (tenants in common) of an estate in respect of their respective receipts from their common agent, or in respect of rents and profits which each had intercepted on their way to the common agent, the back accounts may, it has been held, be taken without any limitation of time, provided there was a continuing account, one party having received more one year, and having received less the previous year. If the separate collections of each cannot be treated as receipts by or on behalf of the common agent, if they cannot be dealt with as if received by each from the common agent, that is, if such separate collections can be alleged to be antagonistic to the other co-owner, the law of limitation may cut short the account. But if the intercepted receipts are not antagonistic to the other co-owner, but are all part and parcel of a common arrangement by which they have to be dealt with as if received from the common agent, it is impossible to say, "We will cut the account short at the 6 or 12 years, and not allow your receipts Accounts between two co-owners having a common agent.

during the 6th or 12th year *ante litem*, to go to pay that which was due to you in the 7th or 13th year *ante litem*." (Ranee Khajurunnissa *v.* Syed Ahmed Riza, 16 W. R., P. C., 1). Cf. notes to art. 120.

Assets received after the 3 years.

Where a partnership is dissolved by the death of one of the partners, and the representative of the deceased partner does not bring a suit against the surviving partner to take the partnership accounts within the period allowed by this article, he may still sue to recover a share in a sum subsequently realized by the surviving partner in respect of partnership transactions. But, in such a suit, the defendant may deduct the amount, if any, which may be found due to him on taking the partnership accounts, although a substantive suit for a general account is barred by this article. (Merwanji *v.* Rustomji, I. L. R., 6 Bom., 628). A suit for a share of partnership assets subsequently received by the surviving partner will be governed by art. 120, if not by art. 62.

Non-joinder.

Non-joinder of necessary parties to a suit for partnership accounts renders the suit liable to be dismissed *in toto*. (See Ramdoyal *v.* Junmenjoy, I. L. R., 14 Calc., 719, and notes to sec. 22).]

Art. 107.	107.—By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate.	Three years ...	The date of the payment.

[No. 107. (No. 107, Act IX). See the notes to art. 61, and Sunker *v.* Goury, I. L. R., 5 Calc., 321.

The suit contemplated by art. 107 is a suit for contribution in respect of a payment made by the manager *as such*, not by the managing member in his *individual* capacity. Money raised by the managing member of an undivided family, on his *personal* security, to enable him to defray the expenses common to him and the other members of the family, (including Government revenue and Municipal taxes payable by the undivided family) does not thereby become a *family debt*. The manager's cause of action for contribution arises from the date when the revenue, taxes, &c., are paid, and not from the date when he repays the loan contracted by him in his individual capacity. (Aghore *v.* Grish, I. L. R., 20 Calc., 18).]

Art. 108.	108.—By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	Three years ...	When the trees are cut down.

[No. 108. (No. 108, Act IX). The date of the expiry of the lease does not affect the question of limitation, nor does the lessor's ignorance of the breach of covenant. The cutting down the trees is the cause of action. (Indoobhooshun *v.* Kenny, 3 W. R., S. C. C. Ref., 9 ; pp. 221, 222, *supra*.)]

Art. 109.	109.—For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years ...	When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession.

[No. 109. (No. 109, Act IX). A suit for the mesne profits of immoveable property is governed by this article. Under Act XIV of 1859, the period of limitation for suing for such profits was six years. (Ranee Surnomoyee v. Onnoda Gobind, W. R., Sp. No., p. 163, F. B.)

Are hereditary offices, immoveable property within the meaning of this article? See pp. 177, 205 (notes) *supra*. West and Haridas, JJ., held that under art. 109, Act IX of 1871, the profits of such offices were profits of immoveable property (Branson's Digest of Unreported Bombay Judgments, 226). The mesne profits of a Julkur or fishery may be sued for under this article. (Elahee Buksh v. Sheo Narain, 17 W. R., 360). Hereditary office. Julkur.

A claim for an account of the profits of a joint (Mitakshara) estate, by one member of the joint family against another is not a claim for mesne profits, for until partition the plaintiff has no specific interest in the estate. (Prithe Pal v. Jowahir Singh, I. L. R., 14 Calc., 493, at p. 509, P. C.) It is otherwise when the members of a family are (by partition or otherwise) entitled to *specific* and *definite* shares. (Shunker v. Hardeo, I. L. R., 16 Calc., 397, at p. 413, P. C.) Joint estate.

Art. 109 is not applicable to a suit for a share of the profits by a *co-sharer* against the *lumburdar* in the N. W. Provinces. (Rihon *v.* Jwala, I. L. R., 16 All., 333). See notes to art. 62.

A separate cause of action in respect of the wrongful receipt by a defendant of the rents and profits of land belonging to the plaintiff, accrues immediately upon the *receipt* by the defendant of each several sum. (W. R., Sp. No., p. 163, F. B.) In cases under Act XIV of 1859 it was held that where the amount of mesne profits could not be ascertained until the end of the year, the cause of action did not arise until the end of that year. (Byjnath v. Badhoo, 10 W. R., 486; Thakoor Dass *v.* Nobin, 22 W. R., 126). Mesne profits received three years next before the filing of the plaint cannot be recovered under the first portion of this article. (Krishnanund *v.* Kunwar Partab, I. L. R., 10 Cal., 785, P. C.; Mahomed *v.* Hasim, I. L. R., 21 Calc., 157, at p. 163, P. C.) Cause of action.

In the second class of suits provided for by this article (see Ram Ghulam *v.* Dwarka, I. L. R., 7 All., 170, F. B.), time does not run from the date of the decree of the Appellate Court, but from the date when possession is recovered under such decree. In this class of cases, mesne profits for *any* number of years may be claimed, provided the suit is brought within three years of the recovery of possession. An ex-parte decree set aside under sec. 108 of Act XIV of 1882 not being a decree set aside on appeal do not fall under the second class. Latter part of column 3.

Taking and carrying away standing crops from land, under a decree which is subsequently reversed, is wrongfully receiving the profits of immoveable property. (Shurnomoyee *v.* Kattari, I. L. R., 4 Calc., 625). See *p.* 680, *supra*.

The plaintiff in the second class of cases is not *bound* to bring a regular suit for mesne profits. He may obtain them in the execution department by application for *restitution* even when the appellate decree is silent on the point. (See Rohni *v.* Hodding, I. L. R., 21 Calc., 340; Rajab Sing *v.* Kooldip, I. L. R., 21 Calc., 989; Balvantra *v.* Sadrudin, I. L. R., 13 Bom., 485). *Applications* for recovery of mesne profits by way of restitution under sec. 583 of the Code of Civil Procedure are governed by art. 178. (Kurupam *v.* Sadasiv, I. L. R., 10 Mad., 66. Restitution.

An application to *ascertain* the *amount* of mesne profits, awarded by a decree under sec. 211 or sec. 212, Civ. Pro. Code, is not governed by any article in the Limitation Act. (Puran *v.* Roy Radha, I. L. R., 19 Calc., 132, F. B.)

Art. 110.	110.—For arrears of rent.	Three years	When the arrears become due.

Price of lodging.

[No. 110. (No. 110, Act IX ; cl. 8, sec. 1, Act XIV). Art. 9 allows a period of one year only for the price of lodging. See the notes to art. 9 for the distinction between house rent and the price of lodging. A lodger is sometimes treated as a mere licensee (Cory *v.*

Water-rate.

Bristow, L. R., 10 C. P., 504 ; Gale, 16). *Water*-rate payable to the proprietor of a canal is not *rent*. (Punj. Rec. No. 171 of 1883, Rivaz).

Use and occupation.

A suit for compensation for use and occupation is not a suit to recover rent, but for damages due on an implied agreement to pay for the use of the landlord's property, and arises out of what may be called a *quasi*-tenancy. Occupaton of the premises by the permission of the plaintiff without any actual demise is sufficient. Occupation as tenant to a third person or as a wrong-doer does not entitle the real owner to sue for compensation for use and occupation. (Woodfall, 509, 511). A tenant holding over after the expiry of his lease may be sued for use and occupation. (*Ibid.*, 516).

Where the suit is for compensation for the use and occupation of land (against the beneficial owners of a *benami* lease) this article does not apply. (Debnath *v.* Gudadhur, W. R., 132 ; Kishen *v.* Roberts, 16 W. R., 287). See notes under art. 120.

Suits to which article does not apply.

Rent cannot be made payable as such to a third person, such as the superior landlord of the lessor. The lessor may, however, claim damages against the tenant for breach of his contract to pay the superior landlord. (Rutnessur *v.* Hurish, I. L. R., 11 Calc., 221, 225).

Suits for the assessment of rent are provided for by art. 130. As to suits for the apportionment of rent see art. 120. Suits for arrears of rent upon a registered contract are governed by art. 116. (Umesh *v.* Adarmoni, I. L. R., 15 Calc., 221). This ruling does not apply to suits under Act VIII of 1885. A suit for rent upon a *registered* lease (unless governed by a special rule of limitation enacted by Act VIII of 1885 or any other local or special law) may be instituted within a period of six years under art. 116. (Umesh *v.* Adarmoni, I. L. R., 16 Calc., 221 ; Iswari Persad *v.* Crowdy, I. L. R. 17 Calc., 469 ; Mackenzie *v.* Mahomed, I. L. R., 19 Calc., 1. F. B. ; Ranigunge Coal Co. *v.* Judoonath, I. L. R., 19 Calc., 489).

This article does not apply to suits for arrears of rent of agricultural land and of undertenures in Bengal. Compare sec. 29, Act VIII of 1869 (B. C.), and see Poulson *v.* Modhoo, 2 W. R., Act X, p. 21, F. B. As to horticultural lands see Hurry *v.* Narsing, I. L. R., 21 Calc., 129. Land leased for building purposes and for establishing a coal depot is not governed by Act VIII of 1885. (Ranigunge Coal Co. *v.* Judoonath, I. L. R., 19 Calc., 489). The Bengal Tenancy Act, 1885, expressly provides that suits and applications for which periods of limitation are thereby provided, shall not be affected by secs. 7, 8 and 9 of Act XV of 1877. For the special periods of limitation and the dates from which they begin to run see the third schedule of Act VIII of 1885, at pp. 522-524, *supra*.

Suits for arrears of road-cess and public works-cess are treated as suits for arrears of rent, see sec. 47, Act IX of 1880 (B. C.) The word "rent" in sec. 65 of the Bengal Tenancy Act, includes road-cess

(Nobin *v.* Bansenath, I. L. R., 21 Calc., 722). As to *dâk*-cess being treated as rent, where it is claimed under the contract by which the rent is payble, see Watson *v.* Sreekristo, I. L. R., 21 Calc., 132.

Under this article, time runs from the date when the arrears become due—not necessarily from the end of the year. Arrears of rent which fell due within three years next before the institution of the suit may be recovered. The liability to pay rent recurs after fixed intervals, so that a portion of the arrears may be barred by limitation, while the other portion is within time. (See p. 326, *supra*). But if the landlord's *title* to the land is *extinguished*, he cannot sue for even the last three years' rents. (*Ibid.* ; see also Chundrabali *v.* Lukhee, 5 W. R., P. C., 1). The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within the time, it becomes an arrear, and continues an arrear until it is paid. Rent in arrear becomes due on the last day of the week, month, or year in which it is payable. (See Kasi Kant *v.* Rohini Kant, I. L. R., 6 Calc., 325). If the claim for arrears of rent is satisfied, but such satisfaction is nullified by a decree between the parties, the rent "becomes due" again, and a suit for such rent may be brought within three years of such nullification. (See Ranee Surnomoyee *v.* Shosi Mukhi, 11 W. R., P. C., 5, and p. 188, *supra*).

Starting point of limitation.

When renewed.

The fact that the landlord did not know who his tenant was, or the fact that he could not realize the rent from the recorded tenant of the tenure, does not give him a longer period against a person who is in possession of the tenure under a purchase from such tenant. (See Ram Runjun *v.* Ram Lall, 5 C. L. R., 62). A decree of 1864, in a suit instituted in 1859, *declaring* a right to enhanced rent is not a cause of action in respect of the rent of 1860. See Doyamoyee *v.* Bholanath, 6 W. R., Act X, p. 77, F. B. This ruling has been followed in Hurro Kumar *v.* Kalikrishna, I. L. R., 17 Calc., 251, where it was held that a final decree dated in 1887 and declaring the plaintiff's right to additional rent from 1878, had not the effect of giving the plaintiff a fresh cause of action for the additional rents of 1878 and the following years, that the rents of those several years fell due at the end of each year (after the service of the notice of enhancement) and could have been sued for notwithstanding the pendency of litigation between the parties. But if the terms of a renewed lease have not been finally settled, and the plaintiff is *not in a position to sue* for the rent fixed by the renewed lease until it has been so settled, the period of three years runs from the date when the plaintiff is first in a position to sue for the arrears. (Sobhandri *v.* Chalamanna, I. L. R., 17 Mad., 225, 227). It is a contradiction in terms to say that rent is due before the landlord is in a position to sue. (*Ibid.*)]

When *not* suspended.

111.—By a vendor of immoveable property to enforce his lien for unpaid purchase-money.	Three years	...	The time fixed for completing the sale or (where the title is accepted after the time fixed for completion) the date of the acceptance.	Art. 111.

[No. 111. (No. 111, Act IX). This article, as regards the starting point of limitation, is based on Toft *v.* Stephenson, 5 D. M., and G. (See Darby and Bosanquet, 122, 139). In neither of the two cases mentioned in the 3rd column, is the vendor entitled to receive the purchase-money before the title is accepted. The purchase-money is

secured by the vendor's lien on the land sold. When the vendee has been in possession of the property as such, the vendor has an equitable lien on the property for the unpaid purchase-money. (Trimalarav *v.* Municipal Commissioners, I. L. R., 3 Bom., 172). In fact, the vendor's lien for unpaid purchase-money arises only when the vendor loses possession of the subject-matter. (Grigsby's Story, sec. 506, note, p. 331). A creditor of an unpaid vendor cannot claim a lien upon the property sold, for any unpaid portion of the purchase-money. (Huriram *v.* Dinapal, 11 C. L. R., 339). But see Story's Eq. Juris. by Grigsby, sec. 1227, *et seq.*

Equitable lien.

Possessory lien.

The *common law* or *possessory* lien of the unpaid vendor of *goods* entitles the vendor to *detain* it for the price of the goods sold. He cannot *sell* the goods to enforce his lien. (Fisher, 4th Ed., pp. 180, 455). Possessory *liens subsist* even when the debt itself is barred by limitation and cannot be recovered by action. (See p. 3, *supra*).

Compare the provisions of art. 132. According to the English law of limitation, there is no difference between the lien of a vendor of immoveable property for his purchase-money, and the lien for money otherwise charged upon, or payable out of, any land. (See Darby and Bosanquet, 118; Toft *v.* Stephenson, 7 Hare, 1. See also 24 Q. B. D., 1). It seems that if the vendor waives his lien, his suit for the recovery of the purchase-money against the vendee *personally* is governed by art. 115, 116, or 120. To enforce a lien is to institute a suit for the recovery of the money by the sale of the property. (See secs. 55 and 100 of Act IV of 1882). A charge is created by act of parties. A lien is created by operation of law. Both are called charges in the Transfer of Property Act).]

Personal action for purchase money.

Art. 112.	112.—For a call by a company registered under any Statute or Act.	Three years	...	When the call is payable.

[No. 112. (No. 112, Act IX). Time (under Act XV) does not run from the date when the call is made, but from the date when the call is payable. This article refers to suits by a registered company against a member of the company to recover the amount of calls made on the shares taken by him. A suit by the liquidator after a winding-up, is governed by art. 120. (Parell Company *v.* Manik, I. L. R., 10 Bom., 483). Cf. I. L. R., 17 Bom., 469 and 472.]

Art. 113.	113.—For specific performance of a contract.	Three years	...	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.

[No. 113. (No. 113, Act IX). A suit for the specific performance of even a registered contract is not governed by the six years' rule under art. 116.

The doctrine of specific performance was not recognized by the Roman law. No system of jurisprudence, except that administered by the Courts of Equity in England, and her past or present colonies and possessions, has ever attempted to enforce the actual performance of contracts in their very terms. (Fry on Specific Performance, 2nd Ed., p. 3).

Laches.

According to the English law, and sec. 22 of the Indian Specific Relief Act, the jurisdiction of the Court to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so. There may be circumstances under which a delay of nearly three years or a lesser delay may according to the Calcutta High Court, be fatal to a suit for the specific performance of a contract. (See Mokund Lall *v.* Chotay Lall, I. L. R., 10 Calc., 1061). See p. 69, *supra*. The High Court at Madras has expressed a *different* opinion on this point. (See Rama Rau *v.* Raja Rau, 2 Mad., 115). And Sir Frederick Pollock thinks that the application of the doctrine of *laches* to suits for specific performance in India is directly calculated to frustrate the purpose of the Indian Legislature in fixing a certain term. (See Tagore Law Lectures, 1894, p. 37). But as the jurisdiction to decree specific performance is *discretionary* the views of the Calcutta High Court on this subject may be supported. See p. 69, *supra*.

No fixed date of performance.

For cases of specific performance where no date is fixed for the performance, see Ahmed *v.* Adjun, I. L. R., 2 Calc., 323; the New Beerbhoom Coal Co. *v.* Buloram, I. L. R., 5 Calc., 175; Virasami *v.* Ramasami, I. L. R., 3 Mad., 87. A covenant providing for what might happen in case either of the parties to a deed of exchange be dispossessed or deprived of the lands exchanged, by adverse title may be specifically enforced within three years of the defendant's refusal to perform it *after* the event contemplated by the covenant. (Hari Tiwari *v.* Roghunath, I. L. R., 11 All., 27, F. B.)

A suit against strangers, and not against the other *parties* to the contract, is clearly not a suit for specific performance. (See I. L. R., 1 Mad., 235, at p. 246, P. C.)

Specific performance *and* possession.

Where there has been only a contract for the sale of land, a suit to have a conveyance executed and completed, *and for possession* of the property, is essentially a suit for specific performance of contract, and the article applicable to such a suit is art. 113. The right to possession springs out of the contract of sale, and the relief by giving possession in such a case is comprised in the relief by specific performance. (See Form No. 111, Sched. IV, Act XIV of 1882). Besides, if by reason of the lapse of the three years allowed by this article, a suit cannot be maintained for specific performance of a contract, it cannot be maintained for possession of the property agreed to be sold under such a contract. (Muhiuddin *v.* Majlis, I. L. R., 6 All., 231).

Conveyance without possession.

Where a person executes a conveyance of land not in his possession, and the deed of conveyance does not contain any specific agreement to put the vendee in possession, a suit by the vendee for possession against the vendor (after he has recovered possession) is not a suit for the specific performance of a contract, but is governed by art. 136 or art. 144. (Sheo Pershad *v.* Udai, I. L. R., 2 All., 718).

Compromise.

Where the plaintiff's suit for possession of land was not founded on contract only, but on a title to the land acknowledged and defined by a deed of compromise which was only part of the evidence of the plaintiff to prove his case, it was held by the Privy Council, that the suit was one for the recovery of immoveable property, and was not barred although nine years had elapsed from the date of the compromise, and the defendant had been in possession of the property notwithstanding his agreement to divide it with the plaintiff. (Rani Mewa Kuar *v.* Rani Hulas, 13 B. L. R., 313, P. C.) A suit for recovery of possession of land, based on a previous compromise between the parties, is not a suit for specific performance of contract,

but a suit for immoveable property, and is governed by art. 144. If the deed of compromise contains an express or implied agreement to surrender possession of the land, the possession of the defendants can only be adverse to the plaintiff from and after the date of the compromise by reason of their having refused to carry out that promise. (Mr. C. G. D. Betts *v.* Mahomed, 25 W. R., 521). For a case where the three years' rule was applied, see Mohadeo *v.* Nundun, 12 W. R., 22.

Suit for money on awards.

It has been held by Division Bench of the Allahabad High Court, that a suit for money, based on an award of arbitrators which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced, and that art. 113 is applicable to such a suit. (Sukho Bibi *v.* Ram Sukh, I. L. R., 5 All., 263). The correctness of this ruling may be questioned : 1*st*, because sec. 30 of the Specific Relief Act, 1887, does not, as regards the question of limitation, place awards on the same footing as contracts (see Stokes' Anglo-Indian Codes, Vol. II, p. 990) ; and 2*ndly*, because the Court, in such a suit, orders the money to be paid as compensation for not satisfying the award. Even in the case of a contract it is not strictly accurate to say, that "pecuniary damages upon a contract for payment of money are, from the nature of the thing, a specific performance." (See Fry on Specific Performance, 2nd Ed., p. 6, and notes to art. 116).

In Raghubar *v.* Madan, I. L. R., 16 All., 3, another Division Bench follow the ruling in Sukho Bibi's case on the ground that the only mode of obtaining practical relief under an award is to sue for specific performance, that is, to bring a suit to cause the party put under obligations by that award to fulfil them. But even conceding that a suit for money based on an award is a suit for specific performance of the award, there is nothing to shew that the term "contract" in art. 113 includes an "award." The safer course is to apply art. 120 to such a suit.

Performance, when refused.

In a suit for specific performance of a covenant which provides that in case either of the parties to a deed of exchange be deprived by adverse title of any part of the lands exchanged, the other party should make it up out of certain of his own land, the cause of action does not arise until he is so deprived. And the suit is not barred if brought within three years of the other party's refusal to perform the covenant *after* such deprivation. (Hari *v.* Raghunath, I. L. R., 11 All., 27, F. B.)]

Art. 114.	114.—For the rescission of a contract.	Three years	... When the facts entitling the plaintiff to have the contract rescinded first become known to him.

[No. 114. (No. 114, Act IX). This article refers to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside. (Bhawani *v.* Bisheswar, I. L. R., 3 All., 846, 848, see notes to art. 91. On the subject of rescission of contracts, see secs. 35 to 38 of Act I of 1877. These sections do not distinguish contracts from actual transfers.

Elements in rescission.

Besides the preliminary fact that a contract exists which is binding on the plaintiff unless and until rescinded, there are two distinct and essential elements in the rescission of a contract. The plaintiff

wants to be discharged from any *future* performance of the obligations he has contracted, and also to be indemnified against any loss he has already subjected himself to by acting on the contract. (Pollock's Tagore Law Lectures, p. 32). Suits for the rectification of instruments are not specially provided for by this schedule. A suit against the administrator with the will annexed of a deceased testator, for the *rectification* of a deed of trust executed by the administrator, on the ground that it did not conform to the provisions of the will under which a charity was established, is governed by art. 120, if the suit is not altogether excluded from the Limitation law by sec. 10. (Advocate-General *v.* Bai Punjabai, I. L. R., 18 Bom., 551, at p. 562). Under sec. 35 of the Specific Relief Act, I of 1877, only contracts in *writing* could be rescinded. The Transfer of Property Act modifies sec. 35 of the Specific Relief Act so that *all* contracts may (now) be rescinded. Under secs. 22 and 31 of the Specific Relief Act, the Court may in its *discretion*, decree specific performance of a contract, or the rectification of an instrument. But under sec. 35 of the same Act the remedy of "rescission" is *not* left to the *discretion* of the Court granting it. The doctrine of laches is wholly inapplicable to suits for the rescission of contracts. The Legislature *expressly* allows a definite period of three years from the time when the true facts first became *known* to the plaintiff. (See Pollock's Tagore Law Lectures, 1894, pp. 36—38). But supposing after having notice of the true facts, the lessor or other contractor being in possession of the subject of the contract does *not elect* either to avoid or not to avoid the contract, his *right* to rescind is not extinguished. (Orr *v.* Sundra, I. L. R., 14 Mad., 255, at p. 257). According to Lord Blackburn, so long as the contractor has made *no election* he retains the right to rescind the contract, *except* where an innocent third party has acquired an interest in the property; or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind. (Erlanger *v.* New S. P. Co., 3 App. Cas., 1218, at p. 1278). For form of plaint for rescission on the ground of mistake, see No. 99, Sched. IV, Act XIV of 1882).]

Rectification.

Laches.

115.—For compensation for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for.	Three years	...	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.	Art. 115.

[No. 115. (No. 115, Act IX; cls. 9 and 10, sec. 1, Act XIV).

This is a general article for suits for compensation on unregistered contracts, whether express or implied, or on contracts which, though registered, are not duly registered in British India under the law in force at the time and place of execution. (See sec. 3). For the meaning of the term "compensation," see notes to art 116.

Quasi-contract.

An obligation which the law raises upon a state of circumstances independently of an express or implied contract between the parties to be affected by it, is not a contract, but only a *quasi*-contract. (See pp. 228, 229, *supra*; and secs. 68 to 72 of the Contract Act).

Loss or damage by carrier.

A suit for loss and damage to goods, based on breach of contract to deliver, is governed by this article. (See notes to art. 36, and The B. I. S. N. Co. *v.* Hajee Mahomed, I. L. R. 3 Mad. 107; Kaluram *v.* The M. R. Co., I. L. R., 3 Mad., 240; and pp. 677, 678, *supra*).

Where a tort or *quasi*-tort arises out of a contract, the plaintiff may sue as for a breach of contract, and claim the longer period of limitation. (Danmull *v.* B. I. S. N. Co., I. L. R., 12 Calc., 477, 481). Farran, J., is of *opinion* that art. 30 applies to *all* suits for compensation for loss of goods, whether the claim is laid in tort or as arising out of contract; but the learned Judge, on the principle of *stare decisis*, would follow the current of decisions in Calcutta and Madras. Bayley, Acting Chief Justice, has held that the Bombay High Court is not bound to follow those decisions. (G. I. P. Ry. Co. *v.* Raisett, I. L. R., 19 Bom., 165, at pp. 186-188). Whenever there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract. The negligence of a professional man may be treated as a breach of his implied contract to use reasonable skill and care. (Underhill, p. 35; p. 228, note, *supra*).

Customary incident.

An obligation to pay money or do any other act founded on an ancient custom (relating to remarriages of widows, &c.), if it may be treated as an implied *incident* of a contract (of marriage, &c.) is governed by this article. (See the judgment of Spankie, J., in Madda *v.* Sheo, I. L. R., 3 All., 385).

Verbal loan.

A loan on a verbal agreement to repay at a specified date is governed by this article. (Rameshwar *v.* Ramchand, I. L. R., 10 Calc., 1033; Ramsami *v.* Muthusami, I. L. R., 15 Mad. 380).

Del credere agent.

A suit against a *del credere* agent for the price of goods sold by him, and not paid for by the purchasers, is governed by this article, if not by art. 65. (See Dukoor Persaud *v.* Foolkoomaree, 16 W. R., P. C., 35).

Contract when broken.

A agrees to take steps to reinstate B in a certain property, in case B should be ousted from it. The agreement is *broken*, if A neglects to take steps to reinstate B within a *reasonable* time (say six months) from the date of the ouster. (See Dorab Ally *v.* Abdool Azeez, I. L. R., 6 Calc., 356, 367).

As to "continuing breaches," see notes to sec. 23 and pp. 222, 631 *supra*. As to "successive breaches," see notes to art. 75, and p. 222 *supra*. When the suit is in respect of one of several successive breaches the three years' limitation runs from the date of that particular breach. A fresh right to sue arises and a fresh period of limitation begins to run upon every one of several successive breaches. (Cf. sec. 23 of Act IX of 1871).

Act XIV.

Under Act XIV of 1859, a suit upon a bond or other instrument which could not be registered under the law then in force was governed by the six years' rule under sec. 1, cl. 16. The three years' rule applied to suits on contracts which *could* be registered, but were not registered within six months of their execution. (Venkatta Challam *v.* Venkatayya, I. L. R., 11 Mad., 207).]

Part VII.—Six years.

Art. 116.	116.—For compensation for the breach of a contract in writing registered.	Six years	... When the period of limitation would begin to run against a suit brought on a similar contract not registered.

[No. 116. (No. 117, Act IX). See notes to art. 115.

This article does not apply to suits for *specific* performance of registered contracts, but to suits for *compensation* for the breach of such contracts. It is therefore wrong to say that the effect of registration of any contract *quoad* limitation is to give a period of six years instead of three. This effect is limited to suits for *compensation* only. (Roghubar *v.* Madan, I. L. R., 16 All., 3, at p. 5). A suit for return of *specific* property on breach of a registered contract not being a suit for *compensation* is not governed by art. 116. (See Subbakka *v.* Maruppak, I. L. R., 15 Mad., 157, at p. 159). Specific performance.

"Registered" means duly registered in British India under the law for registration in force at the time and place of executing the contract. (See sec. 3). Registered.

It has been held that a bond or other instrument is *duly* registered even if the executant was a minor or a lunatic at the time of execution, provided he did not appear to be such to the registering officer; and that the concealment of the fact of the executant's incapacity both by himself and by the plaintiff from the registrar does not invalidate the registration proceedings. (Sham Charan *v.* Choudhry, I. L. R., 21 Calc., 872). The Indian Contract Act, IX of 1872, distinguishes "contracts" from *quasi*-contracts. The latter are treated of separately in Chapter V, secs. 68 to 72, under the heading "Of certain Relations *resembling* those created by Contract." A bond executed by a minor for money borrowed for necessaries within the meaning of sec. 68 of the Contract Act creates obligations *resembling* those created by contract." But it has been held that a suit for the breach of such an obligation, is a suit for the breach of a "contract" within the meaning of art. 116. (Sham Charan *v.* Choudhry, I. L. R., 21 Calc., 872). It is apprehended, that though the bond was registered, art. 116 was not applicable to the case. Art. 120 which also gives a limitation period of six years could be safely applied to such a case. Contracts, and *quasi*-contracts.

An instrument may be registered in respect of *some* of the parties to it. In such a case a suit against the *others* is not governed by this article. (Pandit Kashi *v.* Panjab, Punj. Rec., No. 3 of 1876; Rivaz, 4th Ed., 165). A suit by the endorsee against the endorser of a registered promissory note is not governed by this article if the endorsement has not been registered. (See Kylasanadaa *v.* Armugum, 4 Mad., 366). Registration or rather attestation before a *cazee* is insufficient to extend the period to six years. (Doya Moyee *v.* Nobonee, 1 W. R., 89). *Partial* registration.

Contract in writing registered.—The contract or covenant for breach of which the suit for compensation is brought must, it is apprehended, be contained in the registered instrument. If there is no *express* personal undertaking in the registered mortgage to pay the mortgage debt, art. 116 will not apply to a suit to recover the debt from the mortgagor personally. (Sawaba *v* Abaji, I. L. R., 11 Bom., 475). But it has been held by Ayyar and Parker, JJ., that a suit for refund of purchase-money on breach of even an *implied* covenant for title is governed by art. 166 if the deed of sale is registered. (Narayan *v.* Peddi, 1 Mad. L. J., 479; Kasturi *v.* Venkata, 1 Mad. L. J., 162. A suit for the rent of a house on the basis of a registered *kabuliyat* executed by the lessee is, it is apprehended, governed by art. 116. But it has been held by Kernan and Brandt, JJ., that unless the contract is signed by *both* the parties it is not a contract in writing within the meaning of art. 116. (Ramasami *v.* Sokkanada, 1 M. L. J., 737. The correctness of this ruling is questioned by the editors of the Madras Law Journal. See 2 M. L. J., pp. 69—75. *Written* contract, what?

Specific articles do not exclude art. 116.

Where the contract is duly registered (see sec. 3) a suit for compensation for its breach must be governed by this article, although suits of exactly the same character are provided for in some other article. The words "not herein specially provided for," which occur in art. 115, are omitted in this article. On this ground, the Calcutta High Court (in Din Doyal *v.* Gopal, I. L. R., 18 Calc., 506, at p. 507) applied art. 116 to a registered instalment bond notwithstanding the express provisions of arts. 74 and 75. A claim for

Interest *ad diem* or *post diem*, is "compensation."

interest by way of *damages*, is *necessarily* a claim for *compensation*, and if the *contract* for repayment of the principal and interest on the due date, is registered, a suit for *post diem* interest or damages may be brought within the six years allowed by art. 116. (Bhagwant *v.* Daryao, I. L. R., 11 All., 416; Badi *v.* Sami, 4 Mad. L. J., 235; Gudri *v.* Bhubanesware, I. L. R., 19 Calc., 19). It may be contended that where there is an express or implied *contract* for the payment of interest, a claim for interest payable as such *under the contract*, (whether such interest be *post diem* or *ad diem*) is not a claim for compensation for *breach of contract*, and that art. 63 should apply to such a claim although the contract itself is duly registered. But as such a suit is a suit for *money* on a registered contract, art. 116 would apply to it. (See p. 759, *infra*).

Starting point.

The period of six years is to commence when limitation would begin to run against a suit brought on a similar contract *not* registered.

Rent.

The terms of art. 116 are large enough to cover contracts for payment of rent, as well as other contracts when in writing registered. (Vythilinga *v.* Thetchana-murti, I. L. R., 3 Mad., 77; Umesh *v.* Adormoni, I. L. R., 15 Calc., 221). But the application of art. 116 of this General Limitation Act may be excluded by a special or local law such as the Bengal Tenancy Act 1885. (See notes under art. 110, and Mackenzie *v.* Mahomed, I. L. R., 19 Calc., 1, F. B.)

Refund of price.

A suit by a vendee for a proportionate refund of price, based on a stipulation in a registered conveyance that if the lands sold be deficient in quantity the vendor shall be responsible for the value of the deficiency, is governed by this article, and not by any other article. (Kishen *v.* Kinlock, I. L. R., 3 All., 712). So a suit to recover money due on a registered bond or promissory note is governed by this article, and

Debts.

not by arts. 66, 67, or the following articles. (Nobocoomar *v.* Siru, I. L. R., 6 Calc., 94; Husain *v.* Hafiz, I. L. R., 3 All., 600, F. B.; Magaluri *v.* Narayan, I. L. R., 3 Mad., 359; Ganesh *v.* Madhab, I. L. R., 6 Bom., 75; Kesu *v.* Vetha, I. L. R., 9 Bom., 320; Khunni *v.* Nasiroodin, I. L. R., 4 All., 255; Kalut *v.* Lala, 11 C. L. R., 361; Rathnasami *v.* Subramanya, I. L. R., 11 Mad., 56; Naubat *v.* Indar, I. L. R., 13 All., 200; Collector *v.* Beti, I. L. R., 14 All., 162, at p. 164; Din Doyal *v.* Gopal, I. L. R., 18 Calc., 506). See also Tirkha *v.* Puran, Punj. Rec., No. 51 of 1880; Rivaz, 4th Ed., p. 164. If the registered

Bengal Tenancy Act.

lease under which rent is claimed is *not* a lease for *agricultural* or *horticultural* purposes, the Bengal Tenancy Act does not apply, and art. 116 is applicable. (Ranigunge Coal Co. *v.* Judoonath, I. L. R., 19 Calc., 489). So again a suit to recover from the administrator of a

Misappropriation by agent.

deceased agent, money misappropriated by such agent, is governed by this article when the contract under which the agent was employed is contained in a duly registered instrument. (Harendro *v.* Administrator, I. L. R., 12 Calc., 357). But in respect of such sums as were received by the agent in the course of transactions which did not come within the scope of the registered agreement, the limitation of

Unwritten contract.

three years applies. (*Ibid.*, see notes to art. 89). Where a registered mortgage contains no personal undertaking to pay the loan, a suit for the money, if maintainable under the circumstances of the case, is not governed by the six years' rule. (Sawaba *v.* Abaji, I. L. R.,

11 Bom., 475). A suit based on an *express* stipulation in a registered contract of partnership is governed by art. 116 although art. 64 might have applied to it if the contract had not been registered. (Ranga *v.* Chinna, I. L. R., 14 Mad., 465). The six years' rule applies to a registered agreement to pay interest *ad diem* or *post diem*. (See pp. 703, 758, *supra*). Express contract.

In ordinary legal parlance, a suit to recover money due upon a bond, or promissory note is a suit for debt or sum certain, whilst a suit for compensation for breach of contract is a suit for unliquidated damages. (I. L. R., 6 Calc., 94, and compare Johuri *v.* Thakoor, I. L. R., 5 Calc., 830, 832). But there can be no doubt that, in the case of a breach of a contract for the payment of money, the amount agreed to be paid is only the measure of damages. If the contract be not performed, the Court will order the obligor to pay the amount as satisfaction for the non-performance of the promise, and not in performance of the contract. It is true that, in Johnson *v.* Bland, Lord Mansfield said: "Pecuniary damages upon a contract for payment of money are from the nature of the thing a Specific Performance." But this remark is not strictly accurate. (Fry on Specific Performance, 2nd Ed., p. 6). In ordinary parlance, in the case of money, it is said that a plaintiff sues for "the money," or "the same money" that was taken from him, not, as in the case of other things, for compensation. But in fact, he does not sue for the same money, or desire to recover the same money. He seeks an equal sum which on account of its equivalence, is called the same sum, and thence again the same money. The plaintiff cannot insist on a restoration of such and such rupees; he can insist only on being paid their exact value in other rupees. This is essentially compensation. (Jagivan *v.* Gulam, I. L. R., 8 Bom., 17). See also Naubat *v.* Indar, I. L. R., 13 All., 200, at pp. 203-205. If payment of a bond or promissory note is refused, or is not forthcoming, then there is a breach, and the suit against the defaulting obligor or promisor, is not to make him do something in furtherance of the contract, for the time for its performance is passed, but is, in reality, one for damages for the breach of it, the measure of which will be the amount of the debt with interest. (I. L. R., 3 All., 609, 610. See also I. L. R., 6 Calc., 94, 95; I. L. R., 4 All., 255). "Compensation" is the general term used in the Indian Contract Act (sec. 73) to denote the payment which a party is entitled to claim on account of loss or damage arising from breach of contract (I. L. R., 3 Mad., 77; I. L. R., 12 Calc., 357, at p. 363), and the suit is none the less a suit for compensation because it is brought for the specific sum due on a bond. (Ganesh *v.* Madhab, I. L. R., 6 Bom., 75).] Compensation —what it includes.

117.—Upon a foreign judgment as defined in the Code of Civil Procedure.	Six years	...	The date of the judgment.

Art. 117.

[No. 117. (No. 116, Act IX). Compare No. 122.

"Foreign judgment" means the judgment of a Court situate beyond the limits of British India, and not having authority in British India, nor established by the Governor-General in Council. (Sec. 3, Act XIV of 1882). All Courts, even in England, except the Privy Council, are foreign Courts, and their judgments are foreign judgments. A foreign judgment involves no merger of the original cause of action. It is optional with the plaintiff to resort to the original ground of action or to sue upon the judgment. (Smith *v.* Nicolls, 5 Bing. N. C., 208). Cf. sec. 14, Act XIV of 1882. Foreign judgments.

Foreign judgments of Native States.

According to the Madras High Court, a suit lies on all foreign judgments, including judgments of Courts of Native States. (Sama *v.* Annamalai, I. L. R., 7 Mad., 164). But according to the Bombay High Court, judgments of Courts of Native States cannot be sued upon in British India. (Himmatlal *v.* Shivajirav, I. L. R., 8 Bom., 593). The last paragraph of sec. 14, Civil Procedure Code (see sec. 5, Act VII of 1888) shows that the Legislature has adopted the view of the Madras High Court. And it has been recently held by their Lordships of the Privy Council that an action upon a judgment of a Court of a recognized Native State is maintainable in Her Majesty's Courts. But it was pointed out by their Lordships in this case that in a personal action (for money) an *ex parte* decree pronounced by a Court of any foreign State to the jurisdiction of which Court the defendant then residing in a different State has not in any way submitted himself, is an absolute nullity on which no action can be brought in Her Majesty's Courts. (Sirdar Gurudyal *v.* Rajah of Faridcote, 4 Mad. L. J., 267 ; I. L. R., 22 Calc., 222, P. C.) As to when judgments of Courts of native states may be *executed* in the Courts of British India, see sec. 229B, Civil Procedure Code, 1882.]

Art. 118.	118.—To obtain a declaration that an alleged adopton is invalid, or never in fact took place.	Six years	... When the allleged adoption becomes known to the plaintiff.

Rulings under Act XIV.

[No. 118. (No. 129, Act IX). Under Act XIV of 1859 it was held that a suit to obtain a declaration that an adoption was invalid was governed by the six years' rule under sec. 1, cl. 16 of that Act, the cause of action arising at the date of the adoption. (See Mrinomoyee *v.* Bhoobun Moyee, 23 W. R., 42 ; Kalova *v.* Padopa, I. L. R., 1 Bom., 248). In a suit by a reversioner upon the death of a Hindoo widow, who had succeeded as heiress of her husband, to recover possession of property by right of inheritance as next heir of the husband, the reversioner's cause of action (under Act XIV of 1859) arose at the time of the death of the widow when the right of entry first accrued to the reversioner ; and this was so even when the widow in her life-time professed to adopt a son, and put him in possession of the property, and where the reversioner brought a suit denying the validity of the adoption. (Sreenath *v.* Mohesh, 12 W. R., F. B., 14). See also Rajendro *v.* Jogendro, 15 W. R., P. C., 41, where it was admitted by Counsel before the Privy Council that limitation in such cases was calculated from the time when the title of the reversionary heir accrued on the death of the Hindoo widow. (I. L. R., 13 Calc., p. 311).

Act IX of 1871.

Art. 129 of Act IX of 1871 for the first time expressly provided for suits to establish or set aside an adoption. Act IX of 1871 was passed on the 24th of March 1871. But it did not come into force before the 1st April 1873. If the right to sue to set aside an adoption was not already barred, the plaintiff had two years' notice under the Statute, that the period of limitation of twelve years from the date of adoption would be applicable on and from the 1st of April 1873. If this period of twelve years expired before the 1st of April 1873, and the plaintiff did not bring his suit before that date, his right of action was barred under Act IX of 1871. (See Mohesh *v.* Taruck, I. L. R., 20 Calc., 487, at pp. 495, 497, P. C.) A right of action so barred could not be revived by Act XV of 1877. (*Ibid.* See also pp. 210, 214, 560, *supra*).

Art. 129 of Act IX was considered to be scarcely applicable to an adoption by a Hindoo widow of heirs to *herself*. (See Raj Bahadoor v. Achumbit Lal, 6 Ind. App., 110 ; 6 C. L. R., 12 P. C., as explained in Jagadamba *v.* Dakhina, I. L. R., 13 Calc., 308, at pp. 321-322). There is nothing in the language of art. 118 of this Act to make it *exclusively* applicable to sons adopted as heirs to the last *male* owner. But the reversionary heirs of the last *male* owner (after the death of the widow) would not care to set aside an adoption of heirs to the widow's *own* property. Their Lordships of the Privy Council (in Jagadamba *v.* Dakhina, I. L. R., 13 Calc., 308) say : "The expression 'suit to set aside an adoption' is not quite precise as applied to any suit." An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all. In the ordinary language of Indian lawyers the expression "set aside an adoption" is applied to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land, and to suits of a declaratory nature." It has accordingly been held by their Lordships that this expression "suit to set aside an adoption" in Act IX included suits which brought the validity of an alleged adoption under question even when the plaintiff prayed for recovery of possession of immoveable property by setting aside such adoption. It was further held that even when the plaintiff did not in terms sue to set aside an adoption, but only to recover possession on his *primâ facie* title as reversionary heir, he was bound to bring his suit within the time allowed by art. 129 of Act IX, provided the defendant was in possession by virtue of an apparent adoption ; and that the plaintiff was not at liberty to bring his suit within the time allowed to reversionary heirs by art. 142 of that Act. According to this decision of the Privy Council, a son adopted by a Hindoo widow, as heir to her husband, without the authority of her husband or under other circumstances which render the adoption wholly invalid, may retain his possession of the property of the widow's husband, if the period allowed by art. 129 of Act IX of 1871 has already elapsed. The validity of his adoption cannot be questioned at any later period. (See also Mohesh *v.* Tarak, I. L. R., 20 Calc., 487). The Calcutta High Court had taken a different view of art. 129 of Act IX. (See Purno *v.* Hemokant, 6 C. L. R., 46). The ambiguous expression "setting aside an adoption" is not used in Act XV of 1877. The new Act uses the more apt expression—obtaining a *declaration* that the adoption was invalid. (I. L. R., 20 Calc., at p. 495).

Adoption as heir to widow.

"Suit to *set aside* an adoption" under Act IX.

Ambiguity removed.

Mr. Mayne (in the 4th edition of his Treatise on Hindoo Law and Usage, p. 166, and 5th edition pp. 177—8) remarks : "Their Lordships (in Jagadamba's case) declined to say whether the alteration of language in the later Act denoted a change of policy, or how much change of law it effected. They proceeded, however, to express themselves strongly against the probability that the same statute would apply two different periods of limitation for a suit declaring the invalidity of an adoption and a suit to recover possession of land founded on such invalidity. Should the same question arise under the new statute, the argument that a similar construction is to be placed upon it will be, at least, a hopeful one." But two different periods from two different starting points were (in the absence of any express provision on the subject) applied by the Courts to the two kinds of suit, so long as Act XIV of 1859 was in force. (See the first paragraph of the notes under this article).

Mr. Mayne's surmise as to effect of Jagadamba's case.

Art. 118 of Act XV apparently applies only to declaratory suits. The language of the article applies to suits having decla-

Declaratory suits.

ratory conclusions only. And a plaintiff who neglects to bring such a suit is not thereby prevented from suing for any further relief when he becomes entitled to such a relief afterwards. Art. 118 of Act XV does not cover any suit for possession, but art. 129 of Act IX did include suits for possession notwithstanding an adoption. In this view a reversionary heir may, under art. 141 of Act XV, sue within twelve years from the death of a Hindoo widow, to recover possession of property which belonged to her husband, although the widow had adopted a son to her husband, and that son was in possession for upwards of twelve years to the knowledge of the plaintiff. (See Basdeo *v.* Gopal, I. L. R., 8 All., 644 ; Lala Parbhu, *v.* Mylne, I. L. R., 14 Calc., 401, at p. 417 ; Ghandharap *v.* Lachman, I. L. R., 10 All., 485, at p. 489 ; Gunga v. Lekhraj, I. L. R., 9 All., 253, at 4. 268 ; Padajirav *v.* Ramrav, I. L. R., 13 Bom., 160, at p. 165). If the widow dies *within* the six years allowed by art. 118, that would be an additional reason for holding that art. 141 applies to the case, inasmuch as the plaintiff would be practically unable to bring a mere *declaratory* suit *after* the death of the widow. (Chintamun *v.* Seth Mohan Lall, 3 Cent. Prov., L. R., 32). But notwithstanding the ruling in Basdeo *v.* Gopal, (I. L. R., 8 All., 644) which was referred to in argument, their Lordships of the Privy Council in Mohesh *v.* Taruck, (I. L. R., 20 Calc., 487, P. C.) expressed an *opinion* in favor of Mr. Mayne's surmise that even under the altered language of art. 118, Act XV of 1877, the reversioner's suit for possession by displacing an apparent adoption by virtue of which the defendant is in possession, must be brought within the time allowed for obtaining a declaration that such adoption is invalid. (*Ibid.*, p. 497). It should be noted, however, that in Mohesh's case, the suit was instituted when Haro Sunderi, the adoptive mother, was still *alive*, and that their Lordships of the Privy Council *may* yet adopt the principle of the ruling in Basdeo *v.* Gopal.

Rulings under Act XV of 1877.

Opinion of Privy Council on the application of art. 118.

Art. 141 has not however been applied where the adopted son was alleged to have been adopted by the *husband* during his lifetime (see I. L. R., 10 All., 485). That article cannot, of course, be applied when the suit to set aside a widow's adoption of an heir to her husband, is brought *before* her death. (See Srinivasa *v.* Venkatramone, I. L. R., 5 Mad., 121). Cf. art. 125, and see notes to arts. 141 and 144.

Art. 141 when inapplicable.

Where the widow adopted a son as heir to herself, and not to her husband, the reversionary heir might even under Act IX of 1871 recover the property left by the husband although he did not bring his suit within the time allowed by art. 129 of that Act ; for the husband's property could be recovered without setting aside such adoption. (Raj Bahadoor *v.* Achambit, 6 C. L. R., 12, P. C., as explained in Jagadamba *v.* Dakhina, I. L. R., 13 Calc., 308, at p. 321).

Widow adopting son to herself.

Art. 129 of Act IX was also defective in some other respects. Arts. 118 and 119 have considerably improved the law on the subject. A Hindoo widow adopts a son under the alleged authority of her deceased husband. Twenty years after the death of the husband, and fourteen years after the date of the adoption, the husband's sister gives birth to a son. Under art. 118, a suit to set aside the adoption by the sister's son or, to speak more accurately, a suit by the sister's son to obtain a declaration that the adoption is invalid, although brought so many years after the death of the widow's husband and the date of the adoption, will not be barred, provided it is brought within six years of the time when the alleged adoption becomes known to the plaintiff. It was otherwise under Act IX (Siddhessur *v.* Sham, 23 W. R., 285). Unless their Lordships of the Privy Council expressly decide otherwise, the death of the widow who makes the

Other defects of Act IX.

adoption will give the plaintiff a fresh right to sue for possession of the property left by her husband. (See Rajendro *v.* Jogendro, 15 W. R., P. C., 41 ; Srinath *v.* Mahes, 12 W. R., 14, F. B. ; Basdeo *v.* Gopal, I. L. R., 8 All., 644 ; Lala Parbhu v. Mylne, I. L. R., 14 Cal., 401, at p. 417). Suit for possession.

Under art. 118, the *onus* is on the plaintiff to shew that he or the person from or through whom he derives his right to sue became aware of the adoption within six years of the suit. (Manik Chand v. Jogal Settani, I. L. R., 17 Calc., 518, at p. 532). Onus of proof.

According to the Punjab Chief Court, the "alleged adoption mentioned in art. 118, must be a transaction by a person with some inherent right to adopt, and which is either denied as a fact by the plaintiff, or challenged as being invalid upon some ground of law or custom which does *not* go the length of asserting that the adoption as an adoption is *wholly impossible*. (Bhagat Ram *v.* Tulsi Ram, Punj. Rec., No. 144 of 1892 ; Rivaz, 4th Ed., p. 169). It may be observed that independently of *custom*, a Mahomedan or a Christian has *no inherent right* to adopt, and that an adoption in the Hindu sense of the term is wholly *impossible* in the case of Mahomedans and Christians. It has been held by a Full Bench of the Punjab Chief Court that a suit which would fall under art. 118 cannot be barred under that article, when it is found on the evidence that the alleged adoption never, in fact, took place, or that there is not *primâ facie* evidence that it did take place. (Sultan *v.* Ilahi Bakhsh, C. A., No. 351 of 1892 ; Rivaz, 4th Ed., p. 169).] Allegation of adoption which did not or could not take place.

119.—To obtain a declaration that an adoption is valid.	Six years	...	When the rights of the adopted son as such are interfered with.	Art. 119.

[No. 119. (No. 129, Act IX).

For an instance of a declaratory suit of this description under the old law, see Kalovakom *v.* Padapa, I. L. R., 1 Bom., 248. Under art. 119 time does not run from the date of the adoption, but from the time when the adopted son's rights as such are first interfered with. If the adopted son is a minor at the time when his rights are first interfered with, he will have three years from the date of his attaining majority to bring a suit for a declaration of the validity of his adoption.

A judgment declaring the validity of an adoption is not a judgment *in rem*. (See Kanhya Lal *v.* Radha Churn, 7 W. R., 339, F. B.) If A interferes with the rights of the adopted son as such, and the adopted son obtains a declaration of the validity of the adoption against A, this declaration will not bind B who may have subsequently interfered with the rights of the adopted son.] Not a judgment in rem.

120.—Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	...	When the right to sue accrues.	Art. 120.

[No. 120. (No. 118, Act. IX ; cl. 16, sec. 1, Act XIV).

Many of the suits which fell under cl. 16 of sec. 1, Act XIV of 1859, were specially provided for by Act IX, and a few others which were not mentioned in Act IX have been specially provided for by Act XV. (See pp. 53—56, *supra*). Thus suits for the wrongful removal and appropriation of moveable property,—suits for contri- Suits not *expressly* provided for by the Acts.

bution,—suits for the restitution of conjugal rights,—suits for mesne profits,—suits by a partner for an account after dissolution of the partnership,—suits for money had and received to the plaintiff's use, —suits to set aside decrees obtained by fraud,—suits to set aside official acts of Government Officers,—suits to set aside instruments, &c., &c., were governed by the six years' rule under cl. 16, sec. 1, Act XIV; but shorter periods were provided for them by Act IX. So again suits to restrain waste, which were nowhere mentioned in Act IX, are now specially provided for by art. 41, Act XV. Interpleader suits (sec. 470, Civil Procedure Code); administration suits (sec. 213, *ibid.*); suits for dissolution of partnership (sec. 215, *ibid.*); suits by trustees for the execution of their trusts (No. 108, Sch. IV, Civil Procedure Code); suits for the abatement of nuisances (No. 101, *ibid.*); suits for general or particular average loss; suits for salvage; suits for the custody of minors; suits for divorce or dissolution of marriage under any law other than Act IV of 1869 (Anjona *v.* Proladh, 14 W. R., 403); suits for restoration to caste (Sudaram *v.* Soodaram, 11 W. R., 457); suits for money on awards of arbitrators, (see notes under art. 113), &c., &c., have not been specially provided for even by Act XV.

Suits not specially provided for by Act XV.

Right to sue.

Right to sue.—Cause of action against *the person* who is sued. A complete right to sue the actual holder of goods for conversion may not accrue until *he* refuses to return them on demand, although a right to sue the owner's son—who had fraudulently taken the goods and deposited them with such holder as his own property, have already accrued. (Miller *v.* Dell, 1891, 1 Q. B., 468; p. 689, *supra*). For a definition of the term "cause of action" see pp. 220, 221, *supra*, and Murti *v.* Bhola, I. L. R., 16 All., 165, F. B.

Art. 120, when to be applied.

Art. 120 is of exceptional application, and before applying it, the Court must be satisfied that no other provision of the Limitation Act is applicable. (Kundun Lal *v.* Banse Dhar, I. L. R., 3 All., 170, 172). In Mahomed *v.* Hasim, I. L. R., 21 Calc., 157, at p. 163, their Lordships of the Privy Council say "Art. 120 should be applied, unless it is clear that the suit is within some other article."

Other general arts.

Arts. 36, 49, 61, 62, 65, 115, 116, and 144 may cover many cases which, at first sight, appear not to have been specially provided for.

Injunctions.

Laches.

Suits for injunctions (except suits to restrain waste), and suits for the rectification of instruments have not been specially provided for. The doctrine of laches is applicable to suits for injunction, and the Court will, in the exercise of the discretion which it has, decline (in the absence of special circumstances) to make a decree even if a much lesser time than six years has elapased. (See pp. 60, 68, 69, *supra*).

In a suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house it was alleged that the defendant had been in exclusive possession for more than six years before suit, it was held that the Limitation Act, Sch. II, art. 120, applied to the suit, which was therefore barred by limitation. It was open to the plaintiff to sue for such *possession* other than exclusive possession (the right to which had already been negatived by a previous suit) as he might be entitled to. (Kanakasabai *v.* Muttu, I. L. R., 13 Mad., 445).

Declaratory suits.

Declaratory suits in respect of forged instruments, adoptions, alienations by Hindu and Muhammudan females, and a Hindu's right to maintenance, are expressly provided for by arts. 92, 93, 118, 119, 125, and 129. But other suits in which the declaration sought

is of a right in property, have not been specially provided for. As regards specific moveable property, it may be observed that a suit *for* such property is *generally* governed by the three years' rule under arts. 48 and 49; and that as regards immoveable property or any interest therein, a suit for *possession* is generally governed by the twelve years' rule under art. 144.

Suit for right to inherit moveable property.

In a suit by a Mahomedan childless widow against her deceased husband's brother for possession of the moveable and immoveable property left by the husband by *establishing her right to inherit* the property of the deceased, it has been held by their Lordships of the Privy Council, that so far as the *cash and moveables* are concerned the suit is governed by art. 120, and not by art. 49 or art. 123. (Mahomed *v.* Hasin, I. L. R., 21 Cal., 157, P. C.) Art. 49, it was held, did not apply because the suit was not for specific moveable property wrongfully taken within the meaning of that article. (*Ibid.*, p. 163). The defendant it was alleged in this case took possession of the disputed property on the date of the death of the owner on the allegation that he was the owner's heir. See notes to art. 123.

Declaration of title to immoveable property—6 or 12 years.

In a case tried under Act XIV of 1859, Couch, C. J., and Ainslie, J., were inclined to hold that the twelve years' clause applied to suits for declaration of title to land. (Mussamut Doolhun *v.* Lall Beharee, 19 W. R., 32). In another case, decided under the same Act, Melvill, J., held that the six years' clause applied to such a suit, while Nanabhai Haridas, J., was distinctly of opinion that where the declaration sought was of a right or interest in immoveable property, the case was governed by the twelve years' rule. (Moru Bin *v.* Gopal Bin, I. L. R., 2 Bom., 120). In another case under Act XIV of 1859, (Azimunnessa *v.* Clement, 6 Mad., 455) Bittleston, J., observed: "When the plaintiff is in full and complete possession of the immoveable property, and seeks the declaration only with a view to establish a right to the possession of title-deeds, or to clear away some cloud upon the title, it seems to me that the suit cannot be considered as falling under sec. 1, cl. 12, but that it falls under the 16th clause of that section giving the period of six years." In a case under Act XV of 1877, Mitter and MacLean, JJ., treated this question as still open. (Luchmon *v.* Kanchun, I. L. R., 10 Calc., 525, 527). In Sankaran *v.* Krishna, I. L. R., 16 Mad., 456, the question whether art. 120 or art. 144 applied to the case was raised, but Ayyar and Handley, JJ., did not find it necessary to decide the question. In Chukkunlal *v.* Lolit Mohun, (I. L. R., 20 Calc., 906, at p. 925) Petheram, C. J., and Ghose, J., also did not decide this question. See the numerous cases referred to by Nanabbai Haridas, J., at pp. 126 and 127 of I. L. R., 2 Bom., in favor of the twelve years' rule. The current of recent decisions, however, is in favor of the applicability of art. 120 to *declaratory* suits in respect of immoveable property or of an interest therein. Thus it has been held by Birdwood and Jardine, JJ., that art. 120 applies to a suit by a Hindu plaintiff for a *declaration* that his maternal grandfather's *estate* was not liable to be sold under a collusive decree obtained against it in a suit against his widow. (Chhaganram *v.* Bai Moti, I. L. R., 14 Bom., 514). It has also been held by the Madras High Court that a suit by an execution purchaser of immoveable property for a declaration that a prior mortgage executed by the judgment-debtor was fraudulent and collusive, is governed by the six years' rule. (Pachamuthu *v.* Chinnaphan, I. L. R., 10 Mad., 213). It was held in this case in 10 Mad., that a "suit for a declaration of title to land was barred by art. 120." (Per Ayyar and Wilkinson, JJ., in Balkrishna *v.* Secretary of State,

Current of recent decisions favors 6 years' rule.

Suits for mere *declarations* in respect of immoveable property—6 years.

I. L. R., 16 Mad., 294, at p. 295). A suit by a mortgagor for a mere declaration that the mortgage has been redeemed is governed by art. 120. (Parwarsali *v.* Musst. Wajidi, 6 Cent. Prov., L. R., 53). A suit for a declaration that a kanom mortgage executed by the present holder of an hereditary office is not binding on his successors is governed by art. 120. (Puraken *v.* Parvathi, I. L. R., 16 Mad., 138). A suit by a decree-holder (against the father of a Mitakshara family) to establish his right to proceed in execution against property which had passed into the hands of the judgment-debtor's sons by *survivorship* is governed by art. 120. Time runs from the death of the father. (Natasayyan *v*, Ponnusami, I. L. R., 16 Mad., 99). If an instalment decree has been obtained against the father and one instalment falls due after his death, a suit for declaration of right to recover the debt from the ancestral joint property which has passed to his sons by *survivorship* is also governed by art. 120, and time runs from the date when the instalment fell due. (Ramayya *v.* Venkata, I. L. R., 17 Mad., 122, 130). It has been held by Kembell and Pinhey, JJ., that a suit for a declaration of heirship to a deceased intestate is governed by the same article. (See Branson's Digest of Unreported Bombay Judgments, 210). So far as cash and moveables left by the deceased are concerned, their Lordships of the Privy Council have expressed a similar opinion. (See Mahomed *v.* Hasin, I. L. R., 21 Cal., 157, P. C., and p. 691, *supra*). Parsons and Telang, JJ., have held that a suit to obtain a declaration that plaintiff is the daughter and heiress of a deceased *vatandar* is not barred if brought within six years (not of the death of the *vatandar* but) of the *denial* of her right and status by the defendant. (Tukabai *v.* Vinayak, I. L. R., 15 Bom., 422). A suit to declare the plaintiff's right to establish a market, on his own land against a Municipality, is governed by art. 120. (Brijomohun *v.* Collector, I. L. R., 4 All., 102). A suit for a declaration of plaintiff's right against Government to have certain remissions made in the sum to which he was annually assessed, it has been held, falls under art. 120. (Balkrishna *v.* Secretary of State, I. L. R., 16 Mad., 294). A suit for a declaration that an order of forfeiture of Talukdari rights is illegal and void is not time-barred if brought within six years of the order of forfeiture. (Samal Das *v.* Secretary of State, I. L. R., 16 Bom., 455, 465). A suit to be *maintained* in joint possession by cancellation of a deed of sale of the whole property by one of the co-parceners, according to Aikman, J., falls within art. 120. (Din Dial *v.* Harnarain, I. L. R., 16 All., 73). It has been held that a suit by the creditors of a deceased person to follow his lands, or the assets of his estate, in the hands of a mortgagee or a puchaser from his heir or devisee, when maintainable is governed by this article. (Greender *v.* Mackintosh, I. L. R., 4 Calc., 897, 920, 925). The Court observed that as the plaintiffs *personally* claimed no right to the possession of the land in question, art. 144 was inapplicable. (*Ibid.*, p. 923). But their Lordships of the Privy Council have applied art. 144 to a case in which the plaintiff sought to enforce a lien or charge on the debtor's property, and did *not* personally claim any right to possession. (See Karan Sing *v.* Baker Ali, I. L. R., 5 All., 1 P. C.) It has been held by the Calcutta High Court that, since the repeal of the last twelve words of sec. 246, Act VIII of 1859, a suit to establish right to property (even when such property is immoveable property) by a person (whether the claimant or the decree-holder) against whom an order under sec. 246, Act VIII of 1859, was passed, is now governed by the six years' rule under this article. (Bissessur *v.* Murali, I. L. R., 9 Calc., 163 ; S. C., 11 C. L. R., 409 ; Brojo Mohun *v.* Radhica, 13 C. L. R., 139). In both these

Suit to be *maintained* in possession—6 years.

cases the six years had not expired from the date of the order, and it was *not necessary* to consider whether the twelve years' rule was not applicable to them. The decree-holder's suit to establish his right to re-attach the property and to sell it in execution being of a declaratory nature, and one in which the plaintiff claims no right to the possession of the land, is probably not governed by art. 144. (See Greender *v.* Mackintosh, I. L. R., 4 Calc., 897, at p. 923). It is, however, otherwise where the suit is by the unsuccessful claimant under sec. 246, Act VIII of 1859. His suit is to *recover* the property which has been improperly attached, and if such property is immoveable the twelve years' rule under art. 144 would be applicable. (See Joyram *v.* Paniram, 8 C. L. R., 54 ; Gopal *v.* Mohesh, I. L. R., 9 Calc., 230 ; Doyanidhi *v.* Kelal, 11 C. L. R., 395, and p. 657, *supra*.

Case to which 12 years' rule applies.

It has been held by the Allahabad High Court that the claim of one pre-emptor against another for a declaration that the plaintiff had the better right to pre-empt the property sold away by a third person is governed by art. 120. (Durga *v.* Haidar, I. L. R., 7 All., 167). As to suits for declaration of right to the malikana of alluvial accretions temporarily settled by Government with the defendant, see Gopinath *v.* Bhugwat, I. L. R., 10 Calc., 697. When the plaintiff is in full and complete possession of immoveable property, and seeks the declaration only with a view to establish a right to the possession of title-deeds, or to clear away some cloud upon the title, the suit is hardly a suit for the recovery of immoveable property or of any interest therein. (See Azimunnissa *v.* C. Dale, 6 Mad., 455, 476). If a person, who is admittedly in possession of land as a *tenant*, wishes to establish his *proprietary* right to the same and to be maintained in proprietary possession thereof, he would, it has been held, be entitled to the period of limitation prescribed for a "suit for possession" of land. (Debiprasad *v.* Jafar Ali, I. L. R., 3 All., 40). For the converse case of a suit to establish the right to receive rent from the party in possession, see Abhoy *v.* Kally, I. L. R., 5 Calc., 949. It should be remembered that in a suit for a declaratory decree, the Court may refuse to make the declaration asked for, even if the suit is brought within the period of limitation. (See Mrinomoyee *v.* Bhubonmoyee, 23 W. R., 42 ; and p. 68, *supra*).

Another such case.

In the case of Pureejan *v.* Bykunt, (7 W. R., 96) it was held that limitation did not at all apply to a claim for a declaration of title where the plaintiff was in possession of the land regarding which the declaration was required. But if the cause of action is not a *continuing* one, it must be barred by some article or other, though it may be conceded that the plaintiff's right to the land is not extinguished by the fact that his suit for declaration is barred by limitation ; and though it may be plausibly argued that a claim for a *declaration* of title cannot be time-barred if a claim for *possession* is not so barred. (See I. L. R., 14 Bom., 512, at p. 513). In Chukkan Lall *v.* Lolitmohun, I. L. R., 20 Calc., 906, at p. 925, Petheram, C. J., and Ghose, J., observe that (except in the few cases *specially* provided for) as in arts. 118 and 124) a suit for a *declaration* of right cannot be held to be barred so long as the right to the property in respect of which the declaration is sought is a subsisting and *continuing* right whether the statutory *period* be six years or twelve years. The period of limitation will be counted from the time when the plaintiff became entitled to *consequential* relief. In Virasami *v.* Ramadoss (4 Mad. L. J., 231) Ayyar and Wilkinson, JJ., held, that in a suit by a vendee in possession of land purchased, for declaration of title and for transfer of registry, the period of limitation does not run from the date of the sale, but from the date

Are declaratory suits barred by *any* limitation.

Cause of action in certain declaratory suits.

on which the defendant (the vendor) denied the plaintiff's right. A suit by a purchaser against his vendor to compel mutation of names in the register is not barred by the lapse of six years from a mere conditional refusal of the Collector to register. The refusal must be absolute and unqualified, negativing the plaintiff's right to the property, of which registry was sought. (Virasami *v.* Ramadoss, I. L. R., 15 Mad., 350). A right to have a purchaser's name registered in Government records is not an interest in immoveable property within the meaning of art. 144. A suit for a declaration of such right against the person whose rights have been purchased, is not barred if brought within six years of the *denial* of such right by the defendant. (Bhikaji *v.* Pandu, I. L. R., 19 Bom., 43, 45). In a somewhat similar case, the Punjab Chief Court held that if the plaintiff has been in possession as proprietor, his suit for a declaration of his title to the land must be instituted within six years from the time when the defendant did the first act prejudicial to his title. (Futteh Singh *v.* Kharak Singh, Punj. Rec., No. 38 of 1882; Rivaz, 4th ed., p. 172).

Certain suit for account.

It has been held that a suit for an account against a person who was trustee and guardian during the plaintiff's minority is governed by art. 120. (Sarada *v.* Brojo, I. L. R., 5 Calc., 910. But see Hurro *v.* Tarini, I. L. R., 8 Calc., 766). A suit by one executor against the representative of another (who had taken out probate before the plaintiff) for an account of the estate of the testator, no breach of trust being alleged, is governed by art. 120. (Shapurji *v.* Bhikaji, I. L. R., 10 Bom., 242). When there was only a resulting trust in favor of the plaintiff and the defendant as co-owner and manager of some joint property was equitably liable to account to the plaintiff for his share of the profits, the suit for an account was held to the governed by art. 120. (Mahammad *v.* Safdar, I. L. R., 7 All., 25). It has been also held that the *account itself* should not be carried back further than six years immediately preceding the institution of a suit for an account against the trustee. (Hemangini *v.* Nobinchand, I. L. R., 8 Calc., 788, 807. See also Advocate-General *v.* Bai Punjabai, I. L. R., 18 Bom., 551, at p. 561.) But the suit may be excluded by sec. 10 from the operation of the Limitation Act, if there is proof of a fund in the hands of the trustee and of his waste or misapplication of it. (I. L. R., 18 Bom., pp. 566, 567). In a suit against a co-parcener and manager of the joint estate for an account of the whole period of his management, the accounts taken by the Judge were limited to the six years immediately preceding the institution of the suit in 1874. On appeal, their Lordships of the Privy Council passingly remarked, that the accounts were so limited "apparently, by force of the Statute of Limitations." (Orde *v.* Skinner, 7 C. L. R., 295, 300, P. C., 4). But cf. Ranee Khojurunissa *v.* Syed Ahmed Reza, 16 W. R., P. C., 1. (See p. 756 *supra*.) As to accounts against *agents*, and as to partnership accounts, see pp. 726, 727, 755 and 756 *supra*.

Peculiar suits for refund.

A landlord got a decree for rent at an enhanced rate, which was affirmed by the High Court, but was ultimately reversed by the Privy Council. Between the date of the first decree and its ultimate reversal by the Privy Council, the same landlord, on the basis of the original decree, obtained a number of decrees in analogous cases against the same defendant, the amount of which he realized in execution. The tenant, on the strength of the decision of the Privy Council, sued for a refund of the excess above the usual rent, paid under execution of the several decrees for rent, and it was held that a suit of this description could hardly have been in the contemplation of the Legislature at the time when the Limitation Act was

passed, that there was some difficulty in treating the suit as one for money had and received, and that the safer course was to apply the six years' rule to such a case. (Kalichurn *v.* Jogesh, 2 C. L. R., 354).

Restitution on reversal of decree.

A obtained a decree against B declaring his right to a sum of money being the proceeds of the sale of some grain on which he held a lien. This decree though set aside by the first Appellate Court was restored by the second Appellate Court. A suit by A for recovery of the sum of money which had been paid away (after the order of the first Appellate Court) to another decree-holder against B, is governed by art. 120. (See Ghasiram *v.* Dhanraj, 5 Cent. Prov., L. R., p. 9). A suit by a party to a suit or his surety, for *restitution* to which he is entitled (on *reversal* of a decree) under sec. 583 of the Civil Procedure Code, being in its nature a suit to be restored to the *status quo ante* is governed by art 120. (Narayan *v.* Narayan, I. L. R., 13 Mad., 437, at pp. 441, 442). Time runs from the date of the reversal of the decree. (*Ibid.*) A suit under sec. 315, Civil Procedure Code, to recover the purchase-money paid by the auction-purchaser at an execution sale, on the ground that the judgment-debtor had no saleable interest in the property is, it has been held, governed by art. 120. (Nilakanta *v.* Imamsahib, I. L. R., 16 Mad. 361).

Use and occupation.

It has been held that a suit for compensation for use and occupation is governed by the six years' rule. [See Debnath *v.* Gudadhar, 18 W. R., 132, cited under art. 110). But it may be doubted if such a suit is not a suit for some reasonable compensation for the breach of an implied contract falling under art. 115. (See Ali *v.* Appadu, I. L. R., 7 Mad., 304, 305 ; and notes to art. 110).

Pálás or turns.

Where the plaintiff claims a *pala* or a right to the worship of an idol for a few days or months of every year, his suit to establish such right is governed by art. 131 ; but where he sues to enforce an *exclusive* right of worship, his suit is governed by art. 120. (Eshan *v.* Monmohini, I. L. R., 4 Calc., 683 ; Gopeekishen *v.* Thakoordass, I. L. R., 8 Calc., 807).

Winding up.

A suit to wind up a partnership, having a larger scope than a suit provided for by art. 106 is governed by art. 120 (Harrison *v.* Delhi and London Bank, I. L. R., 4 All., 437).

Certain equitable claims.

Where moveable property belonging to Z has been wrongfully converted by A, and such property has been sold by A's brother as A's agent, and the sale-proceeds are not made over to A or his representative, the amount of compensation decreed to Z, for the wrongful conversion, against A or his representative may be realized from the property of such agent ; and a suit to enforce such an equitable claim against the agent to follow the sale-proceeds in his hands is governed by art. 120. (Gurudas *v.* Ram Narain, I. L. R., 10 Calc., 860, P. C.) As the agent sold the property and *received* the sale-proceeds on behalf of the principal, and *not for the plaintiff*, art. 62 doe not apply. On the same principle art. 120 applies to a suit by an attaching creditor of the principal for monies in the hands of the agent where such agent retained the money after the death of the principal. (Chand Mal *v.* Agnan, I. L. R., 13 All., 368). A successful intervenor under sec. 280 of the Civil Procedure Code obtains compensation-money from the Collector in respect of the acquisition (under the Land Acquisition Act) of the property which had been attached in execution. The attaching creditor's suit for this money, after he has established the judgment-debtor's right to the property, is governed by art. 120. (Krishnan *v.* Perachan, I. L. R., 15 Mad. 382).

Calls and deposits.

A suit brought by the liquidator of a company for calls against shareholders is not governed by art. 112 but by art. 120. (Parell *v.* Manik, I. L. R., 10 Bom., 483). Even if art. 112 be applicable, time does not commence to run before the name of the shareholder is registered, for his liability to pay cannot arise before that date. (Chhota Lall *v.* Dalsukram, I. L. R., 17 Bom., 472 ; Malikchand *v.* Dalsukram, *ibid.*, 469). See notes to art. 112. Art. 60 or art. 145 not applying, a suit for the return or re-payment of moneys deposited in a Government treasury (Sheoraj *v.* Collector, 2 N. W., 379) or of money deposited as security for the due discharge of the duties of an office is governed by art. 120. (Upendra *v.* Collector, I. L. R., 12 Calc., 113).

Apportionment of rent or revenue.

A suit by a tenant for the apportionment of his rent, after butwarrah-proceedings between his joint landlords, is governed by art. 120. (Doorga *v.* Ghosita, I. L. R., 11 Calc., 284). In this case the suit was for apportionment of the rent payable to one of the landlords for the portion of land obtained by him on partition out of what had theretofore been held by the tenant under all the co-sharers jointly. This ruling is not applicable to a suit by one proprietor against other joint proprietors for apportionment of revenue payable on the plots of land in plaintiff's possession. So long as the joint liability lasts each of the proprietors is entitled to claim an apportionment and such claim can no more be time-barred than can a claim for rent so long as the title to the rent is not extinct. (Per Ayyar and Best, JJ., in Ananda *v.* Vyyanna, I. L. R., 15 Mad. 492).

Charge on chattels.

A suit to enforce payment of money charged upon *moveable* property is not governed by art. 132. Where the charge is created by law or custom, art. 120 may apply to such a suit. It has been held by the Madras High Court that in the case of an unregistered bond hypothecating moveable property, a suit to enforce the sale of the property is governed by the three years' rule. (Vilta *v.* Kalikara, I. L. R., 11 Mad., 153). But see Branson's Digest of Unreported Bombay Judgments, 219 ; Punj. Rec. No. 116 of 1881, Rivaz, 148 ; and notes under arts. 57 and 80). It has been held in Calcutta that art. 120 applies to such a suit. (Nim Chand *v.* Jagabandhu, I. L. R., 22 Calc., 21).

Removal of trees, and filling up tanks.

A suit to compel a *trespasser* (who has no right to use the property in dispute for any purpose) to remove trees planted by him on such property is governed by art. 120. (Musharath *v.* Iftkhar, I. L. R., 10 All., 634). A suit to compel such a person to fill up a tank excavated by him on plaintiff's property is also governed by art. 120. It has been held by the Calcutta High Court that such suits against *tenants* are also governed by art. 120. (Kedar *v.* Khetter, I. L. R., 6 Calc., 34 ; Gunesh *v.* Gondowar, I. L. R., 9 Calc., 147). The Allahabad High Court have held that art. 32 applies to such suits against tenants. (Gungadhur *v.* Zahuree, I. L. R., 8 All., 446). It is submitted that when such perversion of the landlord's property amounts to a breach of covenant, and the suit is for compensation, art. 115 or art. 116 may apply. If the lease is registered, and it includes a covenant which is broken by the perversion, the six years' rule will apply under art. 116, but not under art. 120. If the suit is for the removal or the filling up, art. 120 will probably apply whether the lease is registered or not.

Suit on custom.

A suit for *haqqi-chaharam*, based on *custom*, must be brought within six years under this article. (Kirath *v.* Ganesh, I. L. R., 2 All., 235).

A suit for *customary* dues and fees payable to a *chhatram* on account of lands held by the defendant, *not* being a suit for *rent* is governed

by art. 120. Cesses or other dues payable to a person by reason of his interest in immoveable property, or in an hereditary office or in a shrine or other religious institution (referred to in art. 13 of the Provincial Small Cause Courts Act, IX of 1887) may be recovered within six years under art. 120 of the Limitation Act, if such cesses or dues are *not* malikana or haqqs within the meaning of art. 132, or rent within the meaning of art. 110. (Venkatavaraga *v.* District Board, I. L. R., 16 Mad., 305, 307).

Pre-mortgage.

A suit to enforce a right of pre-mortgage or pre-lease is governed by this article (see p. 655, *supra*). It has been held by the Allahabad Court that a suit to enforce a right of pre-emption in respect of a conditional sale that has become absolute is governed by this article. (Nath Prasad *v.* Ram Paltan, I. L. R., 4 All., 218, F. B.; Rasik *v.* Gojraz, I. L. R., 4 All., 414). The period of six years is to be counted from the date when the sale becomes absolute. Under Bengal Reg. XVII of 1806 the period would run from the date of the expiry of the year of grace, and not from the date of the decree in a regular suit for possession. (Ali *v.* Kalka, I. L. R., 14 All., 405, F. B.) There is no doubt that art. 120 is applicable where the property sold is incapable of physical possession. But where physical possession may be taken of the property sold, art. 10 may apply, see p. 654, *supra*. As to suits between two rival claimants of the right of pre-emption, see Durga *v.* Haider, I. L. R., 7 All., 167, and p. 656, *supra*.

Pre-emption in cases of conditional sale.

Debt on a statute.

Where debt lies on a *statute*, an action for the debt is governed by art. 120. (President of Municipal Commission *v.* Srikakulopu, I. L. R., 3 Mad., 124). In this case the suit was for recovery of a municipal tax, which had not been paid by the defendant. Such a debt is not a penalty under art. 6.

A suit for money due under a *statutory* liability to pay it, as for instance a suit by the old proprietor of an estate for surplus sale-proceeds which the Collector is bound to pay him on demand under sec. 31 of the Revenue Sale Law, Act XI of 1859, is governed by art. 120. (Secretary of State *v.* Abdul Bari, I. L. R., 20 Calc., 51, at p. 57, F. B.) Time runs from the date of demand. *(Ibid.)*

Debt of Mitakshara father.

A suit to recover a debt contracted by a Mitakshara father, from the ancestral joint property which has passed into the hands of his sons by *survivorship*, is governed by art. 120. (Ramayya *v.* Venkata, I. L. R., 17 Mad., 122, 130).

Quasi contracts.

Suits arising out of certain relations resembling those created by contract, under secs. 68 to 72 of the Indian Contract Act, 1872, will be governed by art. 120, if arts. 48, 61, 62, and 96 be not applicable. Dr. Stokes suggests that suits on the *quasi* contracts mentioned in the Contract Act should be specially provided for. (Anglo-Indian Code, vol. II, p. 951). See notes to art. 116.

Peculiar notes.

In Sanjivi *v.* Kama, (I. L. R., 6 Mad., 290), a Division Bench of the Madras High Court held, that a suit upon a promissory note "payable at any time within six years upon demand" was governed by art. 120. But it does not appear that the provisions of art. 80 were brought to the notice of the Court. See Karindan Kuttiassan *v.* Suppi, cited at p. 720, *supra*.

Maintenance.

A suit for maintenance by a person other than a Hindu not being governed by arts. 128 and 129, falls within this article if it cannot come under art. 115, 116, or 132.

Restitution of conjugal rights.

It has been held by the Allahabad High Court that to a suit for restitution of conjugal rights by a Hindu (or a Mahomedan) art. 120 is applicable. (Binda *v.* Kaunsilia, I. L. R., 13 All., 126. See p. 679, *supra*).

Setting aside certain sales by reversioners.

A sale in execution of a decree against the widow being *in invitum* as regards the widow, is not an alienation made by the widow. Art. 125 does not apply to such a sale. Nor does that article apply to a suit to set aside an alienation made by the widow, instituted by the daughter's son during the life-time of the widow and the daughter. Art. 120 would apply to such cases. (See Chhaganram *v.* Bai Motigavri, I. L. R., 14 Bom., 512, at pp. 514, 515).

Removal of a manager or *sebait*

A suit to remove the manager of a temple, to deprive him of his control over the temple properties, and for a declaration that the plaintiff is entitled to appoint another manager in the place of the defendant is governed by this article, if not by art. 124 or 144. (Palwant *v.* Puran, 13 C. L. R., 39, P. C.)

A suit to oust a *shebait* from his office, the appointment to which has been made by *nomination*, such office *not* being *hereditary*, is governed by art. 120. (Jagannath *v.* Birbhadra, I. L. R., 19 Calc., 776).

Rectification of deed.

A suit for the *rectification* of an instrument is governed by art. 120. (See notes under art. 114).

Avoiding forfeiture, or decision.

A claim for a declaration that a forfeiture of Talukdari rights in a village, ordered by Government, is unauthorized by law and therefore void falls within art. 120. (Samaldas v. Secretary of State, I. L. R., 16 Bom., 455, 465).

A suit to set aside a *decision* passed by the survey-officer in determining disputes arising in framing the register under Bombay Khoti Act I of 1880 is governed (not by art. 13 or art. 14 but) by art. 120. (Faki Golam *v.* Sajnak, I. L. R., 18 Bom., 244).

Other cases.

As to the applicability of art. 120, see Fuckoruddeen v. Mohima, I. L. R., 4 Calc., 529, in which it was held that certain suits for contribution were not covered by the language of art. 99. See also Nundolall v. Meer Aboo, I. L. R., 5 Calc., 597; Ramkishan *v.* Bhawani, I. L. R., 1 All., 333, cited under art. 62, and referring to certain cases of "money had and received" by the defendant. As to suits for the price of land against the buyer, see the notes to art. 111. Where a right to sue, not existing previously, is given by a new Act, in respect of a transaction which had occurred before, limitation runs from the date when the new Act comes into operation. Banning, 278, Angell, sec. 61.]

New statutory right.

Part VIII.—Twelve years.

Art. 121.	121.—To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a *putni talug* or other saleable tenure sold for arrears of rent.	Twelve years ...	When the sale becomes final and conclusive.

[No. 121. (Nos. 119 and 120, Act IX; sec. 7 and sec. 1, cl. 12, Act XIV). The same principle applies to sales for arrears of rent as to sales for arrears of revenue; and under-tenures or other incumbrances are only voidable at the option of the purchaser. Under the general law, it is not necessary, for the purpose of avoiding an under-tenure or other incumbrance, that the purchaser should give any notice or

do any act before bringing his suit, provided the suit is brought within the time prescribed by this article. (Titu Bibee v. Mohesh Chunder, 12 C. L. R., 304 ; I. L. R., 9 Calc., 683, F. B.) Justice and sound policy require that the option of avoidance should be exercised "within a reasonable time," but this object is in some measure secured by the Limitation Act. (See Raja Suttosurrun v. Mohesh Chunder, 11 W. R., P. C., 10). Notice to avoid not necessary.

Sec. 167 of the Bengal Tenancy Act, 1885, expressly provides that a purchaser having power to annul an incumbrance under any of the foregoing sections of that Act, and desiring to annul the same, may, within one year from the date of the sale, or the date on which he first has notice of the incumbrance, whichever is later, present to the Collector an application in writing, requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled. The incumbrance shall be deemed to be annulled from the date on which the notice is served on the incumbrancer. The language of art. 121, "to avoid" is hardly appropriate to the case of tenures sold under Act VIII of 1885. The service of the notice avoids the incumbrance, and the suit is to realize the subject-matter of the incumbrance or under-tenure which has been so avoided or annulled. (See Unnoda v. Mothura, I. L. R., 4 Calc., 860, 863). Necessary under Bengal Tenancy Act.

As to the privilege of an auction-purchaser at such sales, and his exemption from the effect of laches on the part of the old proprietor, see Goluck v. Hurro, 8 W. R., 62 ; Moonshee Buzlool v. Prandhun, 8 W. R., 22, 222 ; Kooldeep v. The Government, 11 B. L. R., 71, P.C.; Narain Chunder v. Taylor, 2 Shome, 78 ; Woomesh v. Rajnarain, 10 W. R., 15 ; Radhagobind v. Rakhaldass, I. L. R., 12 Calc., 82 ; Shyamlal v. Luchman, I. L. R., 15 Calc., 353, at p. 355. "The only advantage which he gains by the character of *auction-purchaser* is, that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *zemindar*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *zemindari*." (Kooldeep *v.* The Government, 11 B. L. R., 71 P. C.) The purchaser of a share of an estate, as well as an old proprietor who recovers the estate by re-purchase from the auction-purchaser, is *not* entitled to avoid incumbrances. Nor is the auction-purchaser of an estate sold for arrears of revenue *not* accruing upon itself entitled to the benefit of this article. (See sec. 53, Act XI of 1859, and Karmi v. Brojo, I. L. R., 22 Calc., 241). As to putni sales, see Tara Pershad *v.* Ramnarsing, 14 W. R., 283. A person who has held possession of property adversely against a former proprietor cannot be allowed, in a suit for possession, to set up such adverse possession against a person who has purchased the property at a putni sale held under Regulation VIII of 1819, within twelve years from the date of the institution of the suit. The purchaser is entitled to the putni free from all incumbrances and in the condition in which it was created. (Khantomani *v.* Bijoy Chand, I. L. R., 19 Calc., 787). Auction-purchasers at Revenue or Patni sales in Bengal.

The assignee or transferee of the auction-purchaser is entitled to exercise the rights of the purchaser. (Koylas v. Jubur, 22 W. R., 29 ; Koylas Bashinee v. Goluckmoni, 10 C. L. R., 41 ; I. L. R., 8 Calc., 230. See also Srimuntram v. Kookoor Chand, 15 W. R., 481 ; Titu Bibi v. Mohesh, I. L. R., 9 Calc., 683, 685). Their assignees.

Encroachments on the talook or estate by neighbouring landholders may be treated by the auction-purchaser as incumbrances. (Goluckmonee v. Huro Chunder, 8 W. R., 62 ; Woomesh v. Rajnarain, 10 W. R., 15 ; Karmi v. Brojo, I. L. R., 22 Calc., 244, at pp. 250, 251). Encroachments.

Easements.

An easement created by the tenant is an encumbrance within the meaning of the Bengal Tenancy Act, 1885. (See sec. 161).

The holdings of *raiyats*, as well as tenures may, under Act VIII of 1885, be sold for arrears of rent. In Bengal, such holdings were not, as a rule, saleable when Act XV was passed.

Acts VIII of 1835 and VII of 1868.

The purchaser of a holding in Dehee Punchannagram at a sale held by the Deputy Collector, under Act VIII of 1835, has not the rights of an auction-purchaser at a revenue sale under Act XI of 1859. (Koylash Chunder Shaha v. Ranee Shurnomoyee, 7 W. R., 318). But art. 121 has been applied to the case of a *tenure* sold for arrears of *re enue* under secs. 11 and 22 of Act VII of 1868 (B. C.) (See Koylashbashini v. Gocoolmoni, I. L. R., 8 Calc., 230). In this last case it was held that the Government or a person claiming under the Government wishing to resume any *lakheraj* grant made *subsequent* to the 1st December 1790 must sue within sixty years under art. 149, and that a purchaser at a revenue sale would have (under arts. 121 and 130) twelve years to bring his suit, but that this period of twelve years would be subject to the limitation of sixty years which would be a bar to the Government itself. (*Ibid.*, pp. 235, 236).]

Lakhiraj resumption.

Art. 122.	122.—Upon a judgment obtained in British India, or a recognizance.	Twelve years ...	The date of the judgment or recognizance.

[No. 122. (No. 121, Act IX ; cl. 11, sec. 1, Act XIV). There has been some difference of opinion as to whether a suit would lie on an unsatisfied judgment of a Court governed by the Civil Procedure Code. (See Sander *v.* Shaik Jomir, 9 W. R., 399 ; Attormoney *v.* Hurry Doss, I. L. R., 7 Calc., 74 ; Moonshi Golam *v.* Kurreembux, I. L. R., 5 Calc., 294 ; Bhavani Shanker *v.* Pursodri, I. L. R., 6 Bom., 292). Most of the cases on the subject are reviewed in Merwanji *v.* Nowroji, I. L. R., 8 Bom., 1, where it has been held that no such suit would lie in our Courts. See also Ramayya *v.* Venkata, I. L. R., 17 Mad., 122, at p. 129. As to foreign judgments, see notes to art. 117.

May judgments be sued upon at all ?

Sec. 94 of the Presidency Small Cause Court Act, 1882, expressly enacts that no suit shall lie on any decree of such Court.

The Limitation Act is not intended to define or create causes of action. (Jivi *v.* Ramji, I. L. R., 3 Bom., 207, 209). The words and phrases employed in the 3rd column of Schedule II cannot be taken to abrogate, modify or add to the rules of the *substantive* laws ; (Binda *v.* Kaunsilia, I. L. R., 13 All., 126, at p. 145). See also Harinath *v.* Mothur Mohun, I. L. R., 21 Calc., 8, at p. 18, P. C.

This Act does not modify substantive laws.

Recognisance.

Recognisance-bonds are usually taken from complainants, witnesses, accused persons, and their sureties, under the Criminal Procedure Code. See secs. 91, 169, 170, 217, 469, 497, Act X of 1882. The Criminal Courts cannot levy the amount forfeited by the sale of immoveable property.]

Art. 123.	123.—For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years...	When the legacy or share becomes payable or deliverable.

[No. 123. (No. 122, Act IX ; cl. 11, sec. 1, Act XIV). This article applies to moveable as well as to immoveable property, to bequests under wills, as well as to shares in cases of intestacy. Art. 140 governs a suit by a devisee for *possession* of immoveable property

against *any person* who may be in possession of the same. The right of a devisee to shares in immoveable property falls into possession, under Hindu law, immediately upon the death of the testator. (See art. 140, and Mylapore *v.* Yeo, I. L. R., 14 Calc., 140, P. C.) Devisee, against person in possession.

The defendant, in a suit under art. 123, is the executor, administrator, or other representative of the estate of the deceased ; and the plaintiff claims the property *as a legacy* or a *distributive share.* A suit by a purchaser from the legatee, against a person unlawfully in possession of the property, is not governed by this article. (Issur Chunder *v.* Juggut Chunder, I. L. R., 9 Calc., 79). See also 1 Mad. L. J., 727. If the property is moveable art. 49, or art. 120 may apply to such a suit. Legatee or next of kin against legal representative.

It has been recently held by the Privy Council that art. 120 (not art. 49) applies to a suit to establish a right to *inherit* the moveable property of a deceased person. (Mahomed Riasat v. Hasin, I. L. R., 21 Calc., 157, at p. 163, P. C.) A suit by a Mahomedan widow against her deceased husbands's brother for a declaration of her right (under a local custom) to inherit the entire property moveable and immoveable left by her husband, or alternatively (under the Mahomedan law) to inherit one-fourth of such property, and for possession of the same is *not* "a suit for a distributive share of property" within the meaning of art. 123. (*Ibid.*) The husband's brother in such a case is at best, in the position of an executor *de son tort.* Art. 123 applies only to a case in which it is sought to obtain the share from a person who is the executor of the will, or otherwise represents the estate with a *legal obligation* to "distribute the share." Suit for share of inheritance against co-heir.

The holder of a certificate of heirship under Bombay Reg. VIII of 1827 is only a manager ; he is not such a representative. (Keshav v. Narayan, I. L. R., 14 Bom., 236, at p. 240). An executor *de son tort* is not such a representative. The defendant in a suit to which art. 123 applies must *lawfully* represent the deceased testator or intestate. (Sithamma *v.* Narayana, I. L. R., 12 Mad., 487). Certificate holder or executor *de son tort* not legal representative.

Although a creditor or a legatee may sue an executor *de son tort,* and make him liable to the extent of the assets which may have come into his hands (sec. 266, Act X of 1865) such executor of his own wrong is not the *rightful* or *legal* representative of the deceased. And notwithstanding Lord Eldon's ruling in Webster *v.* Webster, (10 Ves., 93) a creditor's suit against the legal representative will not be barred simply because he *could* have sued an executor *de son tort* who had intermeddled with the assets more than six years before the institution of the suit. Under the *express* enactment in sec. 17, Act XV of 1877 (where the right to sue has not accrued during the lifetime of the testator or the intestate) limitation commences to run from the time when there is a "*legal* representative" of the deceased, and not from the time when there is a "person who could be sued." Sec. 17, however, has nothing to do with suits for legacies or distributive shares in which the right to sue necessarily arises *after* the death of the testator or the intestate. Webster *v.* Webster. Sec. 17.

In some cases where no objection was taken on the ground that the defendant was not the *lawful* personal representative of the deceased, art. 123 has been applied, although as a matter of fact the defendant was only one of the co-heirs of the plaintiff. (See Abdul v. Aishamma, I. L. R., 16 Mad., 61, at p. 63, F. B.) But strictly speaking heirs or relatives in possession of the property of the deceased are *not* under a *legal obligation* to pay a legacy *as a legacy,* or to distribute a share *as a distributive share.* In the case of the property of deceased persons to whom the provisions of secs. 187 and 190 of the Indian Succession Act have not been Loose and strict application of this article.

Where Act X of 1865 does not apply.

extended, a suit to inherit a share of the moveable property of the deceased is governed by art. 120, and a similar suit for a share of the immoveable property by art. 144. A claim for immoveable property *devised* to the plaintiff is, of course, governed by art. 140 which specially provides for *all* suits for *possession* of bequests of immoveable property as distinct from legacies of moveable property.

Dispossession of legacies once enjoyed.

Art. 123 does not apply where the plaintiff alleges that he had *enjoyed* the deceased's property in common with the other co-heirs *after* his death, and that he was excluded from the common possession and enjoyment only a short time before the institution of the suit. (*Ibid.*) Art. 144 was applied to such a suit for possession. (*Ibid.*) But it is apprehended art. 142 was the more applicable article. (See Kartick *v.* Saroda, I. L. R., 18 Calc., 642, at p. 646). Where the object of the suit is not to recover the legacy (it not being denied that the plaintiff has been admitted to the enjoyment of the legacy) but to have it defined what that legacy really is, art. 123 does not apply. (Hemangini v. Nobin, I. L. R., 8 Calc., 788, at p. 802).

Share or whole.

The word 'share' is not intended to exclude the whole residue. (Kherode *v.* Durgamony, 2 C. L. R., 112, 118). A part of the residue not disposed of by will, as well as a share of the residue bequeathed by the testator, is governed by this article. (Hemangini *v.* Nobinchand, I. L. R., 8 Calc., 788, 805 ; Tripura Sundari *v.* Debendro Nath, I. L. R., 2 Calc., 45, 54). The applicability or otherwise, of this article has been also considered in Kally Churn *v.* Dukhee, I. L. R., 5 Calc., 692.

Legacy charged on land.

A legacy *charged on land* devised to the executor may be sued for as if it were a case under art. 132. (See Girish *v.* Anundomoyee, I. L. R., 15 Calc., 66, P. C.) A legacy secured by an express trust within the meaning of sec. 10 may be recovered by the *cestui que trust* without any limitation of time, that is, supposing the executor is also an express trustee, he may be sued in his latter character at any time without any limitation. (See Darby and Bosanquet, 2nd Ed., p. 171). Where the person entitled to receive a legacy is also the executor who is liable to pay it, the statute will not run so long as the two characters are united in the same person. (See Binns v. Nichols, L. R., 2 Eq., 256 ; and p. 245, *supra*).

Executor when bound to pay or deliver under Act X of 1865.

The assent of the executor is necessary to complete a legatee's title to his legacy. An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death. (See secs. 292, 297, Act X of 1865 ; and secs. 112 and 117, Act V of 1881). The question when a legacy or share becomes "payable or deliverable," within the meaning of this article is referred to at p. 799, I. L. R., 8 Calc., but the High Court did not decide the question.

In Earle *v.* Bellingham, 14 Beav., 448, Romilly, M. R., appears to have thrown out an intimation that (under English law) in the case of a legacy, the statute of limitation does not begin to run till twelve months after the death of the testator. This was, however, merely an *obiter dictum*, and Lindley, L. J., doubts whether that view is correct. (Hornsey *v.* Monarch, 24 Q. B. D., 1, at p. 10).

Payable or deliverable.

In the absence of an express direction in the will, and if there are sufficient assets, a legacy is usually considered to be payable at the end of one year after the testator's death. (Darby and Bosanquet, 2nd Ed., p. 180). But inasmuch as the executor's year is allowed only for convenience and does not prevent vesting, time may commence to run even before the end of the year, if there are clearly assets at once.

(Banning, 2nd Ed., pp. 229, *et. seq.*; Gartshore *v.* Chalie, 10 Vesey, 13). A legacy is not payable until the executor has in his hand sufficient assets. (Stokes' Anglo-Indian Codes, Vol. II., p. 992). As to after-acquired assets time runs against a residuary legatee from the time they severally fall into possession. (Adam *v.* Barry as explained in Binns *v.* Nichols, L. R., 2 Eq., 257). When time begins to run.

Where, under the terms of the will, a legacy is payable on the happening of a contingency, time does not run until the contingency happens. (Prosunno *v.* Gyan, 13 W. R., 354).]

Art. 123 is not applicable to a legatee's suit to compel an executor to get in, for the legatee's benefit, assets subsequently coming into existence. Suit for getting in assets.

124.—For possession of an hereditary office.	Twelve years...	When the defendant takes possession of the office adversely to the plaintiff. *Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.	Art. 124.

[No. 124. (No. 123, Act, IX). In England, offices of dignity when they are not accompanied with the right to fees and emoluments, are not within any statute of limitation. (Banning, 283).

If the profits of the office have been received by the defendant (or the person from or through whom the defendant derives his liability to be sued) for more than twelve years adversely to the plaintiff, the plaintiff's right to the office is extinguished, and he cannot recover even the last three years' profits or arrears of dues. (Madvala *v.* Bhagvanta, 9 Bom., 260 ; Venkatasubbara *v.* Surayya, I. L. R., 2 Mad., 203). 12 years' *adverse* possession extinguish right.

The possession of the office of *Dharmokarta* of a Pagoda by a female, married and estranged from the family of the founder, may be adverse to the surviving male members of the family, and may, after twelve years, extinguish their right to the office. (Chenna Kesavaraya *v.* Vaidelinga, I. L. R., 1 Mad., 343).

An hereditary office, according to Hindu law, is immoveable property. Where such office could be held by Hindus only, it was, in the absence of a definition of immoveable property, in Act XIV of 1859, treated as such by the Courts. (See Venkata *v.* Surayya, I. L. R., 2 Mad., 283 ; and pp. 177, 205, *supra*). A suit for the recovery of an hereditary office, which could be held by Hindus as well as by other persons, was governed by the six years' rule under Act XIV. (I. L. R., 2 Mad., 283). But cf. Chhaganlal *v.* Bapubhai, I. L. R., 5 Bom., 68, 70, in which all hereditary offices and all payments or allowances on account of such offices were treated as immoveable property under Act XIV. Since Act IX of 1871 came into operation, the twelve years' rule applies to suits for possession of all hereditary offices. Hereditary offices often treated as immoveable property.

The right to the lands or other emoluments attached to an hereditary office, being a secondary claim in a suit for the possession of

the office, is affected by the same bar which affects the claim for the office. (Zammiraru v. Pantina, 6 Mad., 301).

Alienation of office, invalid.

An alienation of the *office* of trustee, specially where the office is a religious one, is in the absence of an established custom regulating the particular foundation or institution legally invalid. (Rajah Vurmah *v.* Rani, I. L. R., 1 Mad., 235, 250, P. C.) See 16 Mad., 73.

Alienation of emoluments as against successors immediate and remote.

As to alienations of property by, and adverse possession against, the holder of an hereditary office, see Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198, and pp. 157, 158, *supra*. It is a general principle that a person filling an office cannot *aliene* the emoluments of the office to the prejudice of his successors. The alienation of lands attached to an hereditary office by the present holder of the office may be questioned by his successor within twelve years from the date when the succession to the office devolves on him. (Muppidi Rapaya *v.* Ramana, I. L. R., 7 Mad., 85). Subject to the law of limitation the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessor, and time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor becomes entitled to possession. (Mahomed *v.* Ganapati, I. L. R., 13 Mad., 277). See also Mohunt Burm *v.* Khashee, 20 W. R., 471. As against the immediate successor, adverse possession will run only from the death of the alienor. But if he allows himself to be barred by limitation after his estate falls into possession, his successor cannot have a fresh start for the recovery of the property alienated. (See Babaji *v.* Nana, I. L. R., 1 Bom., 535 ; and Radhabai v. Anantrav, I. L. R., 9 Bom., 198, 204, 230). When limitation has commenced to run after the death of the alienor, it will not cease to run simply because the *de facto* successor in the office was removed by the Civil Court. The fact that there was no legal manager of the *math* or endowment during the twelve years following the death of the alienor does not affect the operation of limitation. (Vethalbowa *v.* Narayan, I. L. R., 18 Bom., 507). An hereditary *vatandar* as well as the *sebait* of an idol in the absence of fraud and collusion fully represents the estate in their hands (*Ibid.* ; Prosunno Coomaree *v.* Golabchand, 23 W. R., 253, P. C.) And adverse possession against one incumbent bars his successors. An alienation by the holder of an hereditary office may not operate as adverse possession against him, if such alienation is valid so long as he lives or continues in office. (I. L. R., 9 Bom., 198 ; Madhava *v.* Narayan, I. L. R., 9 Mad., 244 ; Jamal v. Murgaya, I. L. R., 10 Bom., 34 ; Krishnaji *v.* Vithalrav, I. L. R., 12 Bom., 80 ; pp. 157, 158, *supra*.] Where the predecessors in office of the plaintiffs more than forty years ago compromised litigation in respect of the exclusive or joint management of the affairs of a temple with the predecessors in office of the defendants, the admission of joint rights in such compromise acquiesced in for so long a period by the predecessors of the parties is binding on their successors. (Nilakandan *v.* Padmanabha, I. L. R., 18 Mad., 1, at p. 12, P. C.) A succeeding Mutwalee of *Waqf* property (which is inalienable according to Mahomedan law) was under the Regulations allowed to recover property alienated by his predecessor provided he brought his suit within twelve years of his appointment. (Jewan Dass *v.* Shaik Kubeerooddeen, 6 W. R., P. C., 3). It has been held by Loch, J., that since the repeal of Beng. Reg. XIX of 1810, and the enactment of Act XX of 1863, a Mutwallee has not the position of an officer appointed by Government for the protection of public property, and is bound by the ordinary rules of limitation. (Shaikh Lau

De facto and *de jure* successors.

Adverse possession against the present holder.

Compromise with present holder.

Mutwalee of *waqf*.

v. Lalla Brija, 17 W. R., 430). As to the effect of the repeal of the old law, see Mahomed *v.* Ganpati, I. L. R., 13 Mad., 277. If an alienation by the manager of an endowment is void, except for his life; if the alienation is not totally void (as it would be where the property is absolutely inalienable), the ordinary rules of limitation will not bar his immediate successor from recovering the property within twelve years of his succeeding to the management. (See the cases cited above). Manager's alienation.

Where the plaintiff sues to enforce his own personal right to manage an endowment, dedicated to religious purposes, there being no question whether or not the property is being applied to such purposes by the manager in possession, sec. 10 is inapplicable. The possession of the defendant being adverse, the suit might fall within art. 124 or art. 144. (Balwant *v.* Puran, I. L. R., 6 All., 1, P. C.) In a suit in which the plaintiffs managing as trustees and guardians the affairs of a temple claimed to exclude the defendants from the management *jointly* with themselves, it was held that sec. 10 did not apply, that when plaintiffs and defendants had been in joint management for more than twelve years, the presumption was that they had a joint right of management, that this was not a case of exclusive possession of the same property at different periods or a case of *contraria possessio*, that Lord Advocate *v.* Young, (L. R., 12 App. Cas., 544), did not apply, and that the suit was barred by limitation. (Nilakandan *v.* Padmanabha, I. L. R., 14 Mad., 153, 162). This ruling was before their Lordships of the Privy Council, but it was not necessary for their Lordships to decide the question of limitation. (Nilakandahen *v.* Padmanabha, I. L. R., 18 Mad., 1, at p. 10). If the right to manage does not constitute an *hereditary* office, or involve the possession of immoveable property, the suit would be governed by art. 120. *Ibid.* A person who has been out of possession of a joint hereditary office for more than twelve years may be *reappointed* by the proper authorities, and a suit by the existing holders of the office for having declared void the appointment of such person as an officer jointly with themselves cannot be decreed on the ground that the right of such person had been extinguished under art. 124 and sec. 28. (Lakshminarayan *v.* Venkataratnam, I. L. R., 17 Mad., 395). Art. 124 does not apply where the office is not *hereditary*. A suit for possession of an office the appointment to which is made by *nomination* is governed by art. 120. (Jagannath *v.* Birbhadra, I. L. R., 19 Calc., 776). Six years' possession of such an office gives the holder a good title to the office. (*Ibid.*) But may a trustee *de son tort* illegally in possession of trust properties acquire a right to the office of trustee? (see 2 Mad. L. J., 301, 306). The ruling in 19 Calc., 776, it has been held in the Central Provinces, does not apply when there is a question of recovering lands attached to the office. (Thakur *v.* Ram Charan, 8 Cent. Prov., L. Rep., 49).]

Sec. 10 does not apply to suit for personal right to office.

Art. 120 when applicable.

Re-appointment of ousted officer.

Where office, not hereditary.

Trustee *de son tort.*

125.—Suit during the life of a Hindu or Muhammadan female, by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for	Twelve years ...	The date of the alienation.	Art. 125.

her life or until her re-marriage.

[No. 125. (No. 124, Act IX).

Declarations and consequential relief.

As to the exceptional nature of *declaratory suits* of this kind, see Ishri Dutt *v.* Hansbatti, I. L. R., 10 Calc., 324, P. C. According to Sir Barnes Peacock, C. J., reversionary heirs presumptive as well as creditors of the last male owner might in a case of adverse possession suffered by a Hindu widow or other female, sue the female, and the adverse holder to have the estate *reduced into possession*, so as to prevent their rights becoming barred by limitation under the law as it existed before Act IX of 1871 came into operation. (See Nobin Chunder *v.* Issur Chunder, 9 W. R., 505, F. B., cited with approval in Adi Deo *v.* Dukharan, I. L. R., 5 All., 532, 538). The plaintiff in such a case could not (under the Specific Relief Act) sue *merely* for a *declaration* of their right. (I. L. R., 5 All., pp. 538, 539). It has been held by Sir Richard Garth, C. J., and Beverley, J., that although under the present law of limitation a reversioner is not barred by adverse possession suffered by the widow, he may bring a *declaratory* suit, if the widow favours the claims of third persons (who allege a preferential right) and thereby *sets up an adverse title* as against the true reversioner. (Ram Pershad *v.* Jokhoo, I. L. R., 10 Calc., 1003). Suits of this nature, however, are not governed by art. 125. Where a Hindu widow admittedly alienates her life interest only, it is immaterial to the reversioner whether such alienation be set aside or not. (Raj Bahadoor *v.* Achambit, 6 C. L. R., 46, P. C.)

Mahomedans.

In the Punjab, Muhammadan widows succeed to their husband's lands (when there are no descendants in the male line) for life, or till they marry again. Similar local customs are recognized in some parts of Oude. (See Mahomed Reasat *v.* Hasin, I. L. R., 21 Calc., 157, P. C.)

Re-marriage.

As to the effect of the re-marriage of Hindu widows, see sec. 2, Act XV of 1856, and Matungini *v.* Ram Rutton, I. L. R., 19 Calc., 289, F. B.

Immediate and remote reversioners.

Art. 125 does not, in terms, apply to suits by persons other than the *immediate* reversioner. The language of the article applies to a suit brought by the presumptive heir, who would be entitled if the female died at the date of instituting the suit. (See Ishri Dutt *v.* Hansbati, I. L. R., 10 Calc., 324, 334, P. C.) The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest in the land. (Kandasame *v.* Akkammal, I. L. R., 13 Mad., 195). As to when remoter reversioners may sue, see Jhula *v.* Kanta, I. L. R., 9 All., 441; Rani Anand *v.* Court of Wards, I. L. R., 6 Calc., 764, P. C. Even the next reversionary heir cannot, strictly speaking, *set aside* the deed of alienation, because it is partially valid; nor can he affect the possession, which the female has a right to keep or to give up to another. (I. L. R., 10 Calc., p. 332; compare Jowla *v.* Dharum, 10 Moore's I. A., 511).

Successive reversioners.

The cause of action for a declaration that the alienation is void *pro tanto* is not revived in favour of reversioners who are born after the expiry of twelve years from the date of alienation. (Pershad *v.* Chedeelall, 15 W. R., 1). On the death of the female, a separate cause of action for immediate *possession* of the property accrues to the reversioner. (See art. 141, and Prosunno *v.* Afzolonnessa, I. L. R., 4 Calc., 523).

Joint life estate.

Where there are two daughters or two widows taking the inheritance jointly as one heir, time runs from the death of the surviving female. (See Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, at p. 516). But *until* the *death* of the widow,

any right to seek a *declaration* possessed by any reversioner whose title to sue had accrued after the alienation must be regarded as derived from the person who was the heir presumptive at the time of the alienation. It could not have been the intention of the Legislature to give successive rights to a series of successive reversioners to harass the alienees with repeated *declaratory* suits in respect of the same alienation. (Chhaganram *v.* Bai Moti, I. L. R., 14 Bom., 512, at p. 515). The reversioner's suit for *possession* though brought within twelve years from the date of the death of the widow may be barred by the special law enacted by sec. 20 of Act IX of 1859 if the alienees of the widow were convicted of rebellion, and the land alienated were seized and confiscated by Government more than a year before the suit. (Ramphul *v.* Badrinath, I. L. R., 13 All., 108; Mahomed *v.* Collector, 13 B. L. R., 392, P. C.) Where the mother of a Hindu minor alienates certain property as his guardian, the alienation is not that of a widow's estate by a Hindu widow. The minor being the last male owner, what is conveyed by the guardian is the absolute estate of such owner. If the minor dies and the mother succeeds him as his heir, a suit for the property instituted by the reversioner after the death of the mother is not governed by art. 125 or art. 141. (See Soundara *v.* Velayudam, 4 Mad. L. J., 275).

Case of successive reversioners.

Art. 141 affected by Act IX of 1859.

Alienation by mother and *guardian* of male owner.

Transfer by succession under an *adoption* made by a Hindu widow is not an alienation within the meaning of this article. (6 Weekly Notes, 244; Rivaz, 4th Ed., 169). See notes to art. 118. Gifts by the widow to the *daughter* which merely accelerate the latter's succession and does not purport to entitle her to more than a woman's estate give no cause of action to the male reversioner. (Bhupal *v.* Lachma, I. L. R., 11 All., 253). A sale of the husband's estate in *execution* of a decree obtained against it in a suit against the widow, is *not* an *alienation* by the widow, within the meaning of art. 125. Chhaganram *v.* Bai Moti, I. L. R., 14 Bom., 512, at pp. 513-514). See also I. L. R., 8 Calc., 653. A suit for a declaration in such a case is governed by art. 120. (*Ibid.*)

What not an "alienation" within this article.

It has been held that if the next reversionary heir dispossesses the widow, and the widow adopts a son twelve years after such dispossession, the adopted son cannot recover the property although he brings his suit within twelve years of his adoption. (Krishnajee *v.* Morbhat, I. L. R., 13 Bom., 276). But if the widow is dispossessed by a stranger, the reversionary heir may sue for the recovery of the property within twelve years of the death of the widow. See art. 141.

Dispossession suffered by the widow.

Alienation implies action on the part of the alienor, while adverse possession implies inaction or a passive lying by. In the case of an improper alienation by a Hindu sonless widow, the right to possession, and the actual possession, are not separated until the death of the widow, see p. 155, *supra*, note (6). Where the alienation is (not good even for the alienor's life but) absolutely invalid, the possession of the alienee is adverse from the date of his taking possession. (See p. 158, *supra*, note (1); Radhabai *v.* Anantrav, I. L. R., 9 Bom., 198; Madhava *v.* Narayan, I. L. R., 9 Mad., 244).]

Dispossession.

Alienation good for life or wholly void.

126.—By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Twelve years ...	When the alienee takes possession of the property.	Art. 126.

[No. 126. (No. 125, Act IX). A suit by a Hindu governed by the law of the Dayabhaga to set aside his father's alienation of ancestral property is not maintainable under the substantive Hindu law.

Art. 126 of Act IX of 1871 which provided for such a suit has not therefore been re-enacted in this Act. Under the Mitakshara, the son is a co-parcener with the father. Limitation under this article runs not from the date of the alienation, but from the time when *possession* is taken by the alienee. (See Raja Ram *v.* Luchman, 8 W. R., 15, F. B.; Munbasi *v.* Nowrutton, 8 C. L. R., 428). The birth of a son subsequent to the alienation does not give him a new right of action, nor can it possibly affect the running of time so far as his elder brother's right to sue is concerned (8 W. R., 15, at p. 21, F. B.) An execution sale is not an alienation. (Issuridutt *v.* Ibrahim, I. L. R., 8 Calc., 653). Adverse possession against the father bars both the father and the son. (Radhabai *v.* Anantrav, I. L. R., 9 Bom., 298, 224). A suit to set aside an alienation by the plaintiff's brother or uncle is not governed by this article, although such *brother* or *uncle* is the *kurta* of the family. An alienation without necessity, of even his own alleged share, by the father or other member of the joint family is invalid and voidable. See p. 700, *supra*, para. 9; I. L. R., 5 All., 384. The birth of a grandson after a sale by the *grandfather* does not give him a new cause of action or stop the running of time against the father. (Sardar Sing *v.* Ajit Sing, 2 Cent. Prov. Law Rep., 141). The language of art. 126 is inapplicable to a suit by a grandson to set aside his grandfather's alienation.]

Article not applicable to sales by a relative *other* than the father.

Art. 127.	127.—By a person excluded from joint family property to enforce a right to share therein.	Twelve years...	When the exclusion becomes known to the plaintiff.

[No. 127. (No. 127, Act IX; cl. 13, sec. 1, Act XIV). Under Act XV of 1877, time does not run from the death of the person from whom the property alleged to be joint is said to have descended, nor from the date of the last payment to the plaintiff by the possessor or manager of such property, nor from the date when the plaintiff claims and is refused his share.

The law under Act XIV.

For the law under Act XIV of 1859, see Gossain Dass *v.* Serookoomaree, 19 W. R., 192; Govindan Pillai *v.* Chidambara, 3 Mad., 99; Lakshman Dada *v.* Ramchundra Dada, I. L. R., 5 Bom., 48, P. C.; Hansji *v.* Valabb, I. L. R., 7 Bom., 297. Under Act XIV of 1859 it was necessary for the plaintiff to prove participation in the profits of the estate within twelve years of the suit. Residence as a member of the family may prove participation, but coming to the family house alone or with his wife and children, on marriages and deaths, and taking their meals there, do not prove such participation. A suit barred under Act XIV could not be revived by the altered law of 1871. (Appasmi *v.* Subrammanya, I. L. R., 12 Mad., 26, P. C.);

Under Act IX.

Mohesh *v.* Taruck, I. L. R., 20 Calc., 487). Under Act IX of 1871, time did not run against the plaintiff until he had claimed and been refused his share; consequently, if a plaintiff had been excluded for fifty years, and, then he claimed his share and was refused, he would have had twelve years from the time of such refusal to bring his suit; or, in other words, he would have had sixty-two years from the time of his exclusion; and if he never claimed or was refused, the period within which he might bring his suit was indefinite. (Kalikishore *v.* Dhununjoy, I. L. R., 3 Calc., 228; Hansji *v.* Valabb, I. L. R., 7 Bom., 297). The time allowed under Act XV is "shorter" within the meaning of sec. 2. (See notes to that section, at p. 561, *supra*).

"Joint family property,"—that is, the joint property of a joint family. The joint property of persons who are not members of a *family* is not "joint family property." (Per Edge, C. J., in Amme *v.*

Zia, I. L. R., 13 All., 282, at pp. 283, 284). See also Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938.

When does art. 127 apply to Mahommedans.

This article applies to Hindus as well as Mahommedans. There are in some districts of India Mahomedan families which might be described as joint. (Amme *v.* Zia, I. L. R., 13 All., 282, at p. 284, F. B.) Repealing the word "Hindu" which appeared in the corresponding article of Act IX of 1871, and substituting the word "person" is due to an intention on the part of the Legislature to meet cases in which by special *custom* Mahomedan families are governed by the Hindu law. (See Patcha *v.* Mohidin, I. L. R., 15 Mad., 57, at p. 60). The Hindu law presumption in favor of joint property does not apply to Mahommedans in Bengal, except where they have adopted the Hindu law of property. (Abdool *v.* Mahomed, I. L. R., 10 Calc., 563). Cf. Achina *v.* Ajunnessa, 11 W. R., 45 ; Moonshee *v.* Molungo, 24 W. R., 1. It has been held in Bombay, that "joint family property" includes property left by a deceased Mahommedan and divisible among his heirs until it is divided ; and that art. 127 applies to a suit by a Mahommedan heir against his co-heirs, to enforce his right to a share of such undivided property and to recover that share by partition. (Bavasha *v.* Masumsha, I. L. R., 14 Bom., 70). See also Abdul *v.* Kriparam, I. L. R., 16 Bom., 186, at p. 189. But the Allahabad and the Madras High Courts consider art. 127 to be inapplicable to a Mahomedan family unless such family is a joint family in the Hindu sense of the term. (Amme *v.* Zia, I. L. R., 13 All., 282, F. B.; Patcha *v.* Mohidin, I. L. R., 15 Mad., 57 ; Kasmi *v.* Ayishamma, I. L. R., 15 Mad., 60, at p. 62). The learned Judges in these cases appear to have confined their attention to a *Mitakshara* joint family, and to have held that (as under the Mahomedan law a coheir can always predicate of the joint and undivided property that he that particular member has a certain *definite* share) Mahomedan coheirs cannot form a joint family in the Hindu sense of the term. But there can be no doubt that art. 127 is applicable to joint Hindu families in Bengal, where, under the *Dayabhaga*, brothers or other coheirs hold the joint family property in *quasi* severalty (Maine, sec. 268) much in the same way as Mahomedan coheirs do so long as they are undivided.

Joint family in Bengal.

Suit to *enforce* right to *share in* joint family property.

Art. 127 provides for a suit "to enforce a right" (not "to establish a right") and by this phrase is intended a claim to obtain actual possession. According to Candy, J., the article is meant to apply to suits for *partition*, whether the whole family property has remained joint or whether on a partition one portion has been left undivided. In the latter case the suit is not barred if the possession of the defendant, of that portion, was a possession conceded to and taken by him as the common property of himself and the other sharers. (Raoji *v.* Bala, I. L. R., 15 Bom., 135, at pp. 143-144). According to Straight and Mahmud, JJ., the plaintiff in a suit under art. 127 prays to enforce his right *to share in*, not to *a share of*, the joint family property ; that is, the plaintiff sues to restore the *status quo ante* of enjoyment that by his exclusion he has been deprived of. (Amme *v.* Zia, I. L. R., 13 All., 282, at pp. 285, 287). Collins, C. J., and Wilkinson, J., have also held that art. 127 does not refer to a suit *for a share*. The learned Judges have further held that art. 127 includes a claim to be entitled to *share in* joint family property although such property is *indivisible*. (Muttakke *v.* Thimmappa, I. L. R., 15 Mad., 186, at p. 191). The Bombay High Court in I. L. R., 14 Bom., 70, and in I. L. R., 15 Bom., p. 143, seem apparently to have understood the phrase "to share therein" as if the word "share" was a noun and not a verb. According to Straight and Mahmud, JJ., it is a verb and means "to have *restoration* to joint enjoyment." (I. L. R., 13 All., p. 287).

But where at the date of the institution of the suit, the family has *ceased* to be a joint family, the plaintiff cannot pray to have *restoration* to joint enjoyment with the defendant.

Partition.

The mere fact that there has been no division of the property during six or seven generations does not deprive the members of an undivided family of the right to demand a partition. (Thakur Durria *v.* Thakur Davi, 13 B. L. R., 165, P. C.) But an informal distribution followed by separate possession for forty years will bar a suit for partition. (18 Calc., 302, P. C.) Art. 127 does not apply to a case where the plaintiff's right to the share claimed is *admitted* by the defendant and the suit is for partition and separate enjoyment.

Introducing additional members.

It applies to suits in which the plaintiff seeks to introduce one or more additional co-sharers into the enjoyment of property alleged to be joint. (Lukhee *v.* Brojo, 11 W. R., 132).

Purchasers and strangers.

The suit contemplated by art. 127 is a suit against alleged co-sharers and managers of joint property, where the question of "joint or not" is the main question between the parties. (See Radhanath *v.* Gisborne, 15 W. R., P. C., 24, and p. 187, *supra*; Issuri Dutt *v.* Ibraham, I. L. R., 8 Calc., 653). Art. 127 does not apply to a person who has *purchased* the rights of one member of the family. (Ram Lakshi *v.* Durga, I. L. R., 11 Calc., 680; Horendra *v.* Aunoardi, I. L. R., 14 Calc., 544). See also Muttusami *v.* Ramkrishna, I. L. R., 12 Mad., 292.

Who are not members of a joint family.

The word "person" in art. 127 means some person claiming a right to share in joint family property, upon the ground that he is a member of the family to which the property belongs. It has been held by Tottenham and Ghose, JJ., that a *daughter*, who lived in her husband's house and had (after her father's death) never lived in her paternal residence with her paternal uncles and other members of the joint family, cannot claim the benefit of the provisions of art. 127. (Kartick *v.* Saroda, I. L. R., 18 Calc., 642). It has been held by their Lordships of the Privy Council that the husband of a sister or daughter of a Hindu cannot become a member of his joint family. (Ramlakshamma *v.* Ramanna, I. L. R., 9 Mad., 482, at p. 491, P. C.) See also Mothura *v.* Borkant, 11 C. L. R., 312, where a daughter's son was held not to be a member of the family of the grandfather. Where the plaintiffs having separated themselves from the defendants have for more than twelve years been to their own knowledge excluded from the joint family property, their suit to enforce a right to share therein is barred by art. 127. (Muttakke *v.* Thimmappa, I. L. R., 15 Mad., 186, at p. 192).

Exclusion from the joint family property in dispute.

The article presupposes the existence of joint family property, and that there has been an exclusion from participation in the enjoyment of it. The words "excluded" and "exclusion" imply previous inclusion. (Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938). When a party is not in possession of any joint property, and does not receive any of the proceeds of the property, he may be said to be excluded from joint property, but not if he is living on the property with the other joint owners, and is supported in the family by the proceeds of the family property. (Jaganatha *v.* Rambhadra, I. L. R., 11 Mad., 380, at p. 392). The exclusion spoken of in this article is, probably, a total exclusion from *the* joint family property. (See Lakshman Dada *v.* Ramchunder, I. L. R., 5 Bom., 48, 60, P. C.; 14 B. L. R., 373, P. C.) But exclusion from *all* joint property is not necessary. (Punj. Rec., No. 86 of 1886; Starling, 3rd Ed., p. 254).

Joint tenancy. Common tenancy.

Art. 127 applies to cases of joint tenancy, as well as cases of common tenancy. Joint tenancy under the Mitakshara may be converted into common tenancy without a partition by *metes* and *bounds*

(Appovier *v.* Rama, 11 Moore's I. A., 75 ; 8 W. R., P. C., 1). When the shares of the members of a joint Mitakshara family are ascertained and determined, their position hardly differs from the position of members of a joint family under the Dayabhaga. If, however, the members of a family cease to have a common manager and a common fund, and they agree to take their respective shares of the rents direct from the tenants, they cease to be members of a "joint family" even in Bengal. In Amme *v.* Zia, I. L. R., 13 All., 282, Mahmud, J., appears to have been of opinion that art. 127 is not applicable where the property of an ancestor descends to the heirs in *definite* separate shares. Parker and Wilkinson, JJ., also would seem to hold that art. 127 contemplates a "joint family" in the Mitakshara sense of the term. (Patcha *v.* Mohidin, I. L. R., 15 Mad., 57). But as Act XV is the law for Bengal as well as for the other Provinces, the expression "joint family property" must have a wider meaning. Common tenancy in Bengal and other Provinces.

Separation in mess and residence does not, until partition necessarily, affect the position of the members of a joint family. (Shaik *v.* Horell, 25 W. R., 116). If the family is undivided for some purposes only, the ordinary presumptions may not arise. (I. L. R., 11 Calc., 777, 783). Separation in certain respects only.

The plaintiff may be a member of a joint family as regards the estate, though there has been a separation in other respects. Obtaining a *declaration* of a right to a definite share in the joint property is sufficiently "enforcing a right to share therein." A member of a joint family under the Mitakshara not having a definite share cannot sue for a share of the profits. (Prithi Pal *v.* Jowahir, I. L. R., 14 Calc., 493, P. C. ; Shankar *v.* Hardeo, I. L. R., 16 Calc., 397). But art. 127 applies even where the plaintiff cannot claim a *definite* share, or enforce a partition. A claim to *share in* joint property, as he was accustomed to do before his exclusion, is governed by this article. (Muttakke *v.* Thimmappa, I. L. R., 15 Mad., 186, at p. 191). Enforcing right to share in.

Although presumably every Hindu family is joint in food, worship and estate, there is no presumption that every family possesses property. (Toolseydas *v.* Premji, I. L. R., 13 Bom., 61). If, at the time when the suit is brought, the plaintiff and defendant are not members of a joint Hindu family, the plaintiff must prove that the property in dispute is joint family property. It is not enough for him merely to call it joint family property, and to show that 13, 30 or 100 years ago he or his ancestors, and the defendant or his ancestors, were joint. If the defendant has been in exclusive possession for upwards of twelve years, he has a *primâ facie* right to the property. If the plaintiff wants to bring himself within art. 127, which places him in a more advantageous position than other claimants, he is bound to show that the share which he seeks to recover was, at some time, *joint property*. It is not sufficient to show that at some prior period, the common ancestors of the parties were members of a joint family. (Obhoy Churn *v.* Gobind Chunder, I. L. R., 9 Calc., 237. See also Tatya *v.* Avaji, I. L. R., 11 Bom., 220, 221). It is not enough that the property in dispute should have been joint family property at *some* previous period, for so much might be predicated of most property in the possession of a Hindu. The plaintiff must prove that *at the time* when he was excluded from the property in dispute, it was the joint property of an existing joint family. (See Thakur *v.* Partab, I. L. R., 6 All., 442, at p. 443). The plaintiff's suit is barred if the defendant has been in possession of the share in question as his own property to the exclusion of the plaintiff, and to his knowledge for twelve years. (Nilo Ram *v.* Proof of *joint property*.

Proof of *inclusion.*

Govind, I. L. R., 10 Bom., 24). Tottenham and Norris, JJ., (in Tulshi *v.* Raja, I. L. R., 14 Calc., 610), held that if at the date of suit the family was admittedly not a joint family, the plaintiff would have to show some sort of possession by himself, some enjoyment of the profits within twelve years of the suit. Living in the family house, but not in the same apartments with the defendant or obtaining a small allowance from the defendant, does not establish joint possession. (Raghunath *v.* Moharaj, I. L. R., 11 Calc., 777, 784, P. C. See p. 159, *supra*). Where the defendant acknowledged plaintiff's right, and requested him to take possession of his share, plaintiff's neglect to do so would not render defendant's possession adverse or exclusive. (Dinkar *v.* Bhikaji, I. L. R., 11 Bom., 365). Time does not run against the plaintiff until his exclusion from the property becomes known to him. (Hari *v.* Maruti, I. L. R., 6 Bom., 741 ; Issuri Dutt *v.* Ibrahim, I. L. R., 8 Calc., 653). It has been said that the property in dispute, whether moveable or immoveable, must have been the property of an existing joint family, at the date when the plaintiff was, to his knowledge, excluded from participation in it. Otherwise art. 127 is inapplicable. (See Thakur *v.* Partab, I. L. R., 6 All., 442, 443). Where the plaintiff does not admit or show by his evidence that the exclusion became known to him more than twelve years before the suit, it is for the defendant to plead and prove that the exclusion became known to the plaintiff before the twelve years. The onus is on the defendant. (Second Appeal No. 1023 of 1888, Srimati Brindarani *v.* Bundhoo, decided by O'Kinealy and Trevelyan, JJ., on the 22nd February 1889).

Onus of proof of *knowledge* of exclusion.

As to evidence of exclusion see Jowla Bux *v.* Dharum, 10 Moore I. A., 511 ; Hari *v.* Maruti, I. L. R., 6 Bom., 741 ; Dinkar *v.* Bhikaji, I. L. R., 11 Bom., 365 ; Ram Chandra *v.* Narayan, I. L. R., 11 Bom., 216 ; Govindan *v.* Chidambara, 3 Mad., 99 ; Muttakke *v.* Thimmappa, I. L. R., 15 Mad., 186.

Minor's knowledge.

Minor members cannot be *excluded* from joint family property to their *knowledge.* (Per Sargent, C. J., in Faki *v.* Faki, I. L. R., 16 Bom., 191, at p. 195). See also Krishnabai *v.* Khangowda, I. L. R., 18 Bom., 197.

As to when the possession of a member of a joint family becomes adverse to the others, see p. 158, *supra.*

Money representing the share of profits of members of a family, deposited by them with the manager, is not joint family property within the meaning of art. 127. (Ahmed *v.* Husain, I. L. R., 10 All., 109).]

Art. 128.	128.—By a Hindu for arrears of maintenance.	Twelve years	... When the arrears are payable.
Art. 129.	129.—By a Hindu for declaration of his right to maintenance.	Ditto	... When the right is denied.

[Nos. 128 and 129. (No. 128, Act IX ; cl. 13, sec. 1, Act XIV). These articles do not apply to Mahommedans or Christians. (See notes to art. 120). Where the maintenance claimed by a Hindu or other plaintiff is charged upon immoveable property, art. 132 applies. (See Ahmad Hossein *v.* Nihaluddin, I. L. R., 9 Calc., 945, P. C.) Many of the cases on the subject of a widow's right to maintenance under the Hindu law are referred to or discussed in Janki *v.* Nandram, I. L. R., 11 All., 194, F. B.

Clause 13, sec. 1, Act XIV of 1859, applied only to cases where, by will or otherwise, the maintenance claimed was made a specific charge on the inheritance of any estate. (Narayanrao *v.* Ramabai, I. L. R., 3 Bom., 415, 320, P. C.) See also Ramnama *v.* Sambayya, I. L. R., 12 Mad., 347. Other cases were governed by the six years' rule. (Kalo Nilkantho *v.* Lakshmibai, I. L. R., 2 Bom., 637). By the Hindu common law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies. Unless maintenance has been actually withheld under circumstances amounting to refusal, no action lies for arrears. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable. (I. L. R., 3 Bom., 420, 421, P. C.) Under Act IX of 1871, if it appeared that there had been a demand and refusal, the plaintiff could recover arrears of maintenance for only twelve years following the date of such demand and refusal. (Jivi *v.* Ramji, I. L. R., 3 Bom., 207). If there had been no claim and no refusal, arrears of maintenance might, it was said, be claimed for any number of years under Act IX of 1871. (*Ibid.*)

Act XIV.

Action for arrears—when it lies.

Act IX.

Where the necessity for bringing a suit for maintenance did not arise until recently when an award of arbitrators was declared to have ceased to operate, the mere non-receipt of any allowance for sixteen years was held to be no bar to plaintiff's suit. (Ramarao *v.* Yeshvantrao, I. L. R., 10 Bom., 327).

16 years' non-receipt no bar.

Under Act XV of 1877, a Hindu's suit for arrears of maintenance must be brought within twelve years from the time when the arrears are payable. If the maintenance is payable on a certain day, limitation runs from that day, and the absence of a demand and of a refusal to pay will not prevent limitation running. (Starling, p. 216). It has been held that under the Privy Council ruling in I. L. R., 3 Bom., 420, a wrongful withholding of maintenance constitutes the cause of action (Malikarjuna *v.* Durga, I. L. R., 17 Mad., 362) that this withholding may be proved either by a demand and refusal or by circumstances which would amount to a refusal of maintenance. If the maintenance has been so withheld for twelve years, six years, or three years before suit, twelve years', six years' or three years' arrears of maintenance may be decreed to the plaintiff under this article. More than twelve years' arrears cannot be claimed under Act XV. (See Motilal *v.* Rai Kashi, I. L. R., 17 Bom., 45).

Act XV.

Wrongful withholding.

Arrears for 12 years or less.

The right to maintenance is a constantly recurring right. (Venkopadhaya *v.* Kavari, 2 Mad., 36).

Recurring *right.*

If a suit for the declaration of a right to maintenance is barred by art. 129 by reason of the defendant having denied the right more than twelve years before the institution of the suit, a suit for subsequent arrears, it may be said, is barred on the principle of the decision in the case of Chhaganlall *v.* Bapubhai, I. L. R., 5 Bom., 68. But as the right to maintenance is not extinguished by sec. 28, this question is not free from doubt. (See the remarks of the Privy Council in Maharana Futtehsanji *v.* Desai Kullianraoji, 20 W. R., 178, 182, P. C.)

Right to, and arrears of, maintenance.

"When the right is denied."—A denial made in answer to a demand is a *refusal.* Even if maintenance has not been demanded by the plaintiff, his right may be *denied* by the defendant, and limitation will run from the date of the denial. (Compare Ramnad *v.* Dorasame, I. L. R., 7 Mad., 341, 343).]

Right when *denied.*

Art. 130.	130.—For the resumption or assessment of rent-free land.	Twelve years ...	Where the right to resume or assess the land first accrues.

[No. 130. (No. 130, Act IX ; cl. 14, sec. 1, Act XIV). There is some difference of opinion as to whether the term "rent-free" is equivalent to "revenue-free." Sir B. Peacock, C. J., Jackson and Macpherson, JJ., held, that a "rent-free" tenure granted by the zemindar was not "revenue-free" within the meaning of sec. 10, Reg. XIX of 1793, and that such a tenure could not be resumed or assessed by the heir of the grantor or by a private purchaser of the zemindary. (Mahomed *v.* Asadunnissa, 9 W. R., 1, F. B.) But in sec. 30, Act XVIII of 1873, and sec. 79, Act XIX of 1873, the Legislature uses the words "exempt from payment of rent" when it refers to the law of the old Regulations ; and in Jaganath *v.* Prag Sing, Stuart, C. J., Pearson and Oldfield, JJ., held, that a "rent-free" tenure, the revenue of which the grantor took upon himself to pay, was void, and liable to resumption by the grantor's representatives, under sec. 10, Reg. XIX of 1793, and other Regulations and Acts (I. L. R., 2 All., 365, F. B.) In this article "rent-free land" means a lakheraj holding, whether created before or after the 1st December 1790. (See Nobin *v.* Janokee, 2 W. R., Act X, 33 ; Kristo *v.* Joy, 3 W. R., 33).

Rent-free and revenue-free.

Old law.

For a review of the law relating to lakheraj tenures in the permanently-settled provinces, see Nobokristo *v.* Koylaschunder, 20 W. R., 459, P. C. ; Erfanoonnissa *v.* Pearee Mohun, I. L. R., 1 Calc., 378 ; and Koylash Bashini *v.* Gocoolmoni, I. L. R., 8 Calc., 230.

For a summary of the rules of limitation applicable to suits for resumption or assessment under the Regulations and under Act XIV of 1859, see Thompson, 2nd Ed., pp. 205, 206. See also Prankishen *v.* Debnarain, 1 Hay, 26 ; Chundrabullee Debie *v.* Luckie Debia, 5 W. R., P. C., 1 ; Dhunputsing *v.* Boojah, 4 W. R., 53 ; Calcutta Sudder Dewany, 1855, p. 501, F. B. ; Calcutta Sudder Dewany, 1861, Vol. I, p. 151.

Holding rent-free for 12 years.

Where no rent has ever been fixed on, or paid for a tenure, and the holder has been in possession for more than twelve years after the right to assess accrued to the zemindar, he is entitled to hold rent-free. (Abhoy *v.* Kally, I. L. R., 5 Calc., 949 ; see p. 326, *supra*).

Resumption of lakheraj and assessment of rent.

This rule does not apply to a suit for assessment of rent where, in respect of a lakheraj holding created after 1st December 1790, a resumption decree declaring liability to assessment has been already obtained. (Birchunder *v.* Raj, I. L. R., 16 Calc., 449). If the resumption decree declares that the land in the possession of the defendant had been part of the permanently-settled estate, and the decree re-annexes the land to the zemindar's estate, that is, if the resumption decree relates to *lakheraj* created *after* the 1st of December 1790, the decree declaring the zemindar's right to assess rent establishes the relationship of landlord and tenant between the parties, and a suit for assessment of rent on such land is not barred by limitation. But a declaration in repect of a lakheraj created *prior* to 1st December 1790 has no such effect. (*Ibid.* See the cases referred to in the judgment of Prinsep and Ghose, JJ.)

Purchasers of estates under Act XI of 1859.

Ancient lakheraj tenures within an estate cannot be resumed or assessed except by an auction-purchaser of the whole estate at a sale for its own arrears of revenue under Act XI of 1859. Suits by such a purchaser and his representatives are barred if more than twelve years have elapsed from the date of the sale becoming final and conclusive. (See sec. 37, Act XI of 1859, and art. 121 of this Act). The purchaser of a share of the estate, or an old proprietor who recovers the

estate by repurchase from the auction-purchaser, is not entitled to count his period of limitation from the date when the auction sale became final. (See sec. 53, Act XI of 1859, and Karmi *v.* Brojo, I. L. R., 22 Calc., 244, at pp. 250, 251). By Act XIV of 1859 and Act IX of 1871, it was provided that, even as against an auction-purchaser at such a sale, the lakhirajdar would be protected if he proved a rent-free holding from the time of the permanent settlement. (Erfanoonnissa *v.* Pearee Mohun, I. L. R., 1 Calc., 378). This proviso is omitted in Act XV of 1877, probably because such a rent-free holding is not an "encumbrance imposed after the time of settlement" within the meaning of sec. 37, Act XI of 1859, and is not therefore liable to be avoided even by an auction-purchaser. Notwithstanding the repeal of sec. 3, cl. 3, Reg. II of 1805 by Act VIII of 1868 (see Modho *v.* Tekait, I. L. R., 9 Calc., 411, 416), a Division Bench of the Calcutta High Court in Koylas Bashinee *v.* Goluckmoni (I. L. R., 8 Calc., 230), held that sixty years possession as lakhiraj would bar the auction-purchaser's suit for resumption or assessment of lakhiraj tenures created after 1st December 1790. But tenures created by the old zemindar after the permanent settlement of the estate are, without any restriction, liable to be avoided, if only the suit is not barred by art. 121. In the permanently-settled districts, the right to resume or assess lakhiraj land, not exceeding 100 bigahs, and held under an invalid grant of a date preceding the 1st December 1790, accrued to the original engager on the date of the settlement. As to lakhiraj lands, whether exceeding 100 bigahs or not, held under a grant of date subsequent to the 1st of December 1790, the right to resume or assess also accrued to the original proprietor on the date of the settlement, if the lakhiraj holding was in existence on that date. Before Acts X and XIV of 1859 came into operation, such suits were governed only by the sixty years' rule laid down in Reg. II of 1805. The right to resume or assess lakhiraj holdings, which have come into existence since the date of the permanent settlement, accrued to the original engager, or his representatives, on the dates on which the lakhirajdars commenced to hold the lands as lakhiraj. But an auction-purchaser of the estate at a revenue-sale always gets a new start. (See Gungadhur *v.* Satcowrie, Calc. Sud. Dew. Rep. for 1850, p. 501, F. B., in which it was decided, that, even as regards lakhiraj grants made before 1790, the auction-purchaser's suit was not barred by limitation if brought within twelve years of his purchase). By the Act of 1859, this ruling was so far modified that no suit for resumption or assessment could be maintained if the lakhirajdar proved that the land had been held rent-free from the period of the permanent settlement. (Kristomohun *v.* Joykishen, 3 W. R., 33). The right of Government to assess invalid lakhiraj tenures exceeding 100 bigahs, and held within the ambit of a permanently-settled estate, under grants of dates preceding the 1st of December 1790, has long since been extinguished by the sixty years' limitation. If the zemindar is barred by limitation, a putnidar or durputnidar deriving his right to sue from the zemindar is also barred. (See Kristomohun *v.* Joykishen, 3 W. R., 33 ; Gungaram *v.* Hureenath, 15 W. R., 436). If the general right of Government to assess lakhiraj land within the ambit of a khas mehal is extinguished by limitation at the date of the settlement of the khas mehal, the person with whom the settlement is made can have no right to assess such land. As to purchasers from Government, see 23 W. R., 24. As to the assessment of *lapsed* service tenures, see I. L. R., 1 Bom., 586.]

Rent-free holding from 1793.

60 years' rule repealed.

Accrual of right to resume.

Right of Government and of derivative holders.

Service tenures.

131.—To establish a periodically recurring right	Twelve years ...	When the plaintiff is first refused the enjoyment of the right.	Art. 131.

[No. 131. (No. 131, Act IX).

Recurring right.

The right to receive payments periodically, *e.g.*, annuities, dividends, interest, malikana (Hurmuzi *v.* Hirdaynarain, I. L. R., 5 Calc., 921 ; Gopinath *v.* Bhugwat, I. L. R., 10 Calc., 697), or maintenance (Venkopadhaya *v.* Kavari, 2 Mad., 36) or rent (p. 326, *supra*), is a periodically recurring right. A claim for rent being a recurring cause of action, a tenant is entitled to set up against such a claim for any particular year, any right which he had to a deduction or *abatement of rent*, notwithstanding that he has paid full rent for several previous years. (Maharajah Dheraj *v.* Chittro, 16 W. R., 201). A claim to establish a right to a abatement of rent is, however, *subject* to the provisions of art. 131. The right to *pálás*, or turns of worship (Eshan Chunder *v.* Monmohini, I. L. R., 4 Calc., 683 ; Gopee Kishen *v.* Thakoordas, I. L. R., 8 Calc., 807), the right to recover burial fees whenever a corpse is brought for burial (Bahar *v.* Pero, 24 W. R., 385), and the right to the performance of the duties of an office or the enjoyment of a watan in *rotation* by different sharers (Sinde *v.* Sinde, 4 Bom., 511) are periodically recurring rights. A suit by a Hindu to establish his right to maintenance is *specially* provided for by art. 129.

Right to, and *arrears* of, periodical payments.

A suit for *arrears* of periodical payments should be distinguished from a suit to establish the *right* to receive these payments. (See p. 326, *supra*). A decree for the arrears in 1868, apparently *without* a declaration of right to *future* payments, is not sufficient to prevent a suit to establish the *right* from being barred by limitation in 1883. (Shivram *v.* Secretary of State, I. L. R., 11 Bom., 222). But if the right has been established by a decree between the parties (Changanlall *v.* Bapubhai, I. L. R., 5 Bom., 68 ; Gajpat *v.* Chimman, I. L. R., 16 All., 189) or if the relation of landlord and tenant exists (Alubi *v.* Kunhi, I. L. R., 10 Mad., 115), a suit for unbarred arrears is maintainable.

Right, against payers or co-sharers.

A suit to establish a *right* to share in a *haqq* or vatan allowance, against the payers of the *haqq* or allowance, as well as against co-sharers in exclusive enjoyment of the same, is governed by art. 131, and in the latter case, time commences to run from the date when the payers recognized the defendant's title and paid him the allowance. (See Keshav *v.* Narayan, I. L. R., 14 Bom., 236). A suit by a co-sharer to establish his title to a share in an annual allowance received by the defendant from Government is one falling under art. 131, and not 144, of the second Schedule of the Limitation Act (XV of 1877). The plaintiffs sued to establish their title to a half share in the *desh-mukhi* allowance annually received by the defendant from the Mamlatdar's treasury, and also to recover six years' arrears. Both the lower Courts found that the plaintiffs had not received their share of the allowance at any time within twelve years before suit, and therefore rejected the plaintiffs' claim as time-barred. *Held*, in second appeal, that the plaintiffs' claim for a declaration of their title to the allowance was governed by art. 131 of the Limitation Act (XV of 1877), under which article it would not be barred by the mere fact of the plaintiffs' exclusion from enjoyment of their share for twelve years before suit, unless it were shewn that such exclusion was the result of *refusal made upon a demand*. The period of twelve years provided by that article would run from the time when the plaintiffs were first refused the enjoyment of the right. *Held*, further, that the claim for *arrears* of the allowance against co-sharers fell under art. 62 of the Limitation Act (XV of 1877). *Held*, also, that if the claim for a declaration of title to the allowance were barred, the

Refused.

Arrears, against co-sharers.

claim for arrears would also be barred. (Raoji *v.* Bala, I. L. R., 15 Bom., 135). If right barred arrears are also barred.

The cause of action to establish title, and the cause of action to recover arrears in the case of a periodical payment, are not distinct and independent, and when the former is barred, the right to arrears is also barred. If the claim to establish title is not barred, or if the plaintiffs have already obtained a declaratory decree establishing their title, then though the plaintiffs may not have received any payment for more than twelve years prior to the institution of their suit, they may recover arrears accruing within the prescribed period of limitation. Art. 132 applies to suits to enforce the payment of arrears of periodical payments of *malikana* and *haqqs* when the suit is brought against Government or other person originally liable for the payment. Art. 62 applies to such suits against co-sharers or other third persons who have actually realized the allowance which was payable to the plaintiffs. A suit for a declaration or the establishment of such a recurring right is governed by art. 131, whether it is brought against the person originally liable to pay or against a co-sharer who has exclusively appropriated the whole of the allowance. Under art. 131 time runs not from the date of exclusion, but from the time when the plaintiff is first refused the enjoyment of the right. Mere absence of enjoyment is not enough. There must be an express repudiation of the claim. If the plaintiffs were to allow the period prescribed by art. 131 to elapse, without suing to establish their right, they could not be allowed indirectly to accomplish the same object by bringing a suit for arrears falling due within the period of limitation. (See the judgment of Candy, J., in Raoji *v.* Bala, cited above; Ramnad *v.* Dorasami, I. L. R., 7 Mad., 341, at p. 343; and p. 326, *supra*.

Where right has been declared.

Malikana and *haqqs*.

Establishment of right.

Non-enjoyment is not refusal.

According to Ayyar and Wilkinson, JJ., art. 131 applies only to those suits in which a decree for *consequential* relief is asked for by virtue of a periodically recurring right. Where no such relief is asked, a suit to obtain a merely *declaratory* decree is governed by art. 120. (Balakrishna *v.* Secretary of State, I. L. R., 16 Mad., 294, at p. 295). Where plaintiffs' right to receive a quit-rent or allowance from the holder of a tenure is admitted or established, a suit for arrears is not time-barred simply because no payment had been made for more than twelve years before suit. But it is otherwise where the liability of the tenure to pay the allowance and the plaintiff's right to receive the allowance are not established. (Alubi *v.* Kunhi, I. L. R., 10 Mad., 115, as explained in Ramachandra *v.* Jaganmohan, I. L. R., 15 Mad., 161).

Suit, not merely declaratory.

A general denial of the right does not amount to a refusal. A refusal must be made in answer to a demand by or on behalf of the plaintiff. Ramnad *v.* Dorasami, I. L. R., 7 Mad., 341, 343.]

Refusal.

132.—To enforce payment of money charged upon immoveable property. *Explanation.*—The allowance and fees respectively called *malikana* and *haqqs* shall, for the purpose of this clause, be deemed to	Twelve years ...	When the money sued for becomes due.	Art. 132.

be money charged upon immoveable property.

Charge and mortgage.

[No. 132. (No. 132, Act IX). See the notes under arts. 62, 63, 111, 135 and 147. Before the Transfer of Property Act was passed, there was no *statutory* enactment in which a charge was distinguished from a mortgage. But it was held by the Madras High Court that in the case of a charge created by a hypothecation bond the land *remained* with the debtor, subject to the creditor's claim ; and that in the case of a mortgage, the mortgagee of land had the absolute property in the land on the debtor failing to perform the condition of payment of the money secured by the mortgage, subject, however, to redemption. (Chetti *v.* Sundaram, 2 Mad., 51 ; I. L. R., 10 Mad., 509, at p. 511). The Transfer of Property Act expressly lays down that there must be a *transfer* of an interest in specific immoveable property to constitute even a simple mortgage. It may be noted that though a person whose property is burdened with a mere charge can pay off the debt and so extinguish the charge, it is not usually said of such a person that he has a right of *redemption* (Shephard and Brown, 3rd Ed., p. 327).

Hypothecation bonds.

In Calcutta, Allahabad and Bombay hypothecation bonds relating to immoveable property are, generally speaking, treated as mortgages within the meaning of the Transfer of Property Act. (See Girwar *v.* Thakur, I. L. R., 14 Calc., 731 ; Sheoratan *v.* Mohipal, I. L. R., 7 All., 258 ; Khemji *v.* Rama, I. L. R., 10 Bom., 519 ; Motiram *v.* Vithai, I. L. R., 13 Bom., 97). In Allahabad and Bombay all such hypothecation bonds are treated as mortgages within the meaning of art. 147 of Act XV of 1877. In Calcutta all such bonds are held to create charges within the meaning of art. 132. According to Ayyar, J., of the Madras High Court, before the Transfer of Property Act came into operation, the holder of a hypothecation bond had no right to call for a *sale* of the hypothecated property ; and that such a bond executed *before* the 1st of July 1882 creates a charge within the meaning of art 132 of Act XV of 1877, while one executed after that date entitles the holder to cause a sale of the property and bring his suit for sale within the period allowed by art. 147. (See Aliba *v.* Nanu, I. L. R., 9 Mad., 218 ; Rangasami *v.* Mottukamarappa, I. L. R., 10 Mad., 511).

Lien on goods.

A suit to enforce a lien on *moveable* property, whether hypothecated (without possession) or pledged (with delivery of possession) is not governed by art. 132. (See notes to arts. 57 and 80). The possessory lien of the unpaid vendor of *goods* entitles him to detain the goods. He cannot sell the goods, but has only a right of retainer. (Fisher, 4th Ed., 455). A pledgee may retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. (Sec. 176, Act IX of 1872). Payment of money charged upon *immoveable* property is enforced by a sale of the property by order of the *Court*.

Act XIV.

Under Act XIV of 1859, a suit for money charged upon immoveable property by way of a simple mortgage was governed by the six years' or the three years' rule, according as the covenant to pay was duly registered or not, provided the plaintiff claimed to recover the money merely as a debt, and did not seek to realize his lien. But a suit in which the releif sought was the recovery of the mortgage-money by a declaration of the *lien*, and a sale of the mortgaged property, was dealt with under cl. 12, sec. 1, as a suit for the realization of an *interest in land*, and as governed by the twelve years' rule. Such a claim, specially where the defendant is

a subsequent purchaser of the mortgaged land, is founded not upon the *contract* to pay the money, but upon the *hypothecation* of the land. (Chetti Gaundan *v.* Sundaram, 2 Mad., 51, 307; Surwan Hossein *v.* Sharoda Gholam Mahomed, 9 W. R., 170, F. B.; Pearee Mohun *v.* Gobind Chunder, 10 W. R., 56; Janeswar *v.* Mahabeer, 25 W. R., 85, P. C.; I. L. R., 1 Calc., 162; Kanchan *v.* Baijnath, I. L. R., 19 Calc., 336, at p. 340). The provisions of Acts IX and XV were evidently not intended to interfere with, but rather to give legislative authority to that which previously rested on judicial decisions only. And most of the Courts in India took this view of the matter. (See Radho *v.* Musst. Roop, 7 N. W. P., 223; Roghubar *v.* Luchmin, I. L. R., 5 All., 461, 462; In the matter of T. Agabeg, 12 C. L. R., 165, 168; Pestonji *v.* Abdool, I. L. R., 5 Bom., 463). But Westropp, C. J., and Melville, J., on the 16th of July 1877 (see Lallubhai *v.* Narain, I. L. R., 6 Bom., 719), held, that the words "suit for money charged upon immoveable property," in art. 132, Act IX, were wide enough to be applicable to the personal remedy on the contract to pay, as well as to the remedy against the land. It may be observed that this literal interpretation of the law is supported by two recent decisions in England on the construction of the words "suit to recover any sum of money secured by any mortgage" in sec. 8 of the English Real Property Limitation Act, 1874. (See Sutton *v.* Sutton, 22 Ch. Div., 511; Fearnside *v.* Flint, 22 Ch. Div., 579). It was probably with a view to obviate this ambiguity (which is also referred to in Forsyth *v.* Bristowe, 8 Exch., 716) that the language of art. 132 was changed in 1877. Now, the words of the first column are "suit to enforce payment of money charged upon immoveable property." Sargent, J., in Pestonji *v.* Abdool, I. L. R., 5 Bom., 463, Norris, J., in the matter of T. Agabeg, 12 C. L. R., 165, and Straight, J., in Raghubar *v.* Luchmin, I. L. R., 5 All., 461, substantially held that, whatever might be the proper interpretation of art. 132, Act IX, the altered language of the law in Act XV was applicable only to the enforcement of the hypothecation against the land; and that as regards the remedy against the person of the mortgagor, the plaintiff had the same shorter period of limitation which was allowed for the recovery of ordinary debts. If the words of art. 132, Act XV of 1877, were "suits to enforce a charge upon land" or 'suits to enforce payment of money charged upon land so far as it is a charge," the language of the law would have been strictly consistent with the current of decisions. But as the actual language of the law was still applicable to suits for purely money-decrees, in respect of debts charged upon immoveable property, it was held by a Full Bench of the Bombay High Court (though with some hesitation), that this literal construction ought to be adopted, the more specially as it was in favor of the right to sue. According to this ruling, even a suit to obtain a mere money-decree for a debt secured by a simple mortgage was governed by the twelve years' rule, under art. 132, Act XV. (See Lallubhai *v.* Narain, I. L. R., 6 Bom., 719; see also I. L. R., 6 Mad., 417). In Raghubar *v.* Luchmin, (I. L. R., 5 All., 461), Straight and Brodhurst, JJ., referred to this Bombay ruling, but said that the current of decisions being the other way, they were not prepared to depart from those decisions. And in Shiblal *v.* Ganga Persad, Oldfield, J., entirely dissented from the Bombay ruling. (See I. L. R., 6 All., 556). But in Mahammad Zaki *v.* Chatku, (I. L. R., 7 All., 120), Straight, C. J., and Duthoit, J., followed and approved the view of the law taken by the Full Bench of the Bombay High Court. So far as money actually charged upon immoveable property is concerned, it is now settled by the decision of the Privy Council in Ramdin *v.* Kalka Prosad, (I. L. R., 7 All., 502), that art. 132 of Act IX of 1871 applies only to claims to

Acts IX and XV.

Difference of opinion as to *nature* of suits under art. 132. Contract or hypothecation or both.

How settled by the P. C.

raise the money out of the property on which it is charged. The language of art. 132 of Act XV is more in favor of this restricted construction. It has accordingly been held that under Act XV the personal liability upon an instrument charging a debt upon immoveable property, must be enforced within three or six years according as the instrument is unregistered or registered, and that the claim to realize the money by a sale of the property upon which it is charged is governed by art. 132. (Miller *v.* Runganath, I. L. R., 12 Calc., 389, at p. 395; Khimji *v.* Rama, I. L. R., 10 Bom., 519, 525; Seshyya *v.* Annamma, I. L. R., 10 Mad., 100; Rathnasami *v.* Subramanya, I. L. R., 11 Mad., 56). It may be mentioned here that in Bulakhi *v.* Tukarambhat, I. L. R., 14 Bom., 377, it was said that the limitation for the *personal* remedy against the mortgagor was three years, but the fact that the mortgage bond was *registered* was probably overlooked by the learned Judges.

Remedy against the *land*. Art. 132.

As to money *deemed* to be charged, as in the case of *malikana* and *haqqs*, see *infra*.

Is the holder of a *rehan* or hypothecation bond, a mortgagee under art. 147?

The introduction of art. 147, in Sched. II of the Limitation Act, 1877, has created another difficulty in the interpretation of art. 132. Does the word "mortgage" in art. 147 include a simple hypothecation bond which does not give the creditor either a right of entry or a power of sale without the intervention of a Court of Justice? Is a suit to enforce payment of money secured by such a bond by the sale of the hypothecated property, a suit "by a mortgagee for foreclosure or sale" within the meaning of art. 147?

Reasons for holding that he is *not*.

It cannot be denied that money lent on such a bond is, in ordinary legal phraseology, money charged upon immoveable property. (Lallubhai *v.* Naran, I. L. R., 6 Bom., 719, 724) and as no distinction between a mortgage and a charge was drawn in any legislative enactment at the date of the passing of Act XV, it has been held that a charge created by a simple mortgage is a charge within the meaning of art. 132. (Davani *v.* Ratna, I. L. R., 6 Mad., 417). A hypothecation bond or a simple mortgage of immoveable property in Behar executed in 1872 was in 1892 treated by their Lordships of the Privy Council as creating a charge within the meaning of art. 132. (See Kameswar *v.* Rajkumari, I. L. R., 20 Calc., 79, P. C.) It must also be conceded that it is not likely that the Legislature by enacting art. 147 intended to give the holder of a simple mortgage an extended period of sixty years for the recovery of the mortgage-debt by the sale of the property mortgaged. It was well-known to the Legislature that from 1793 to 1877, a mortgagee had been allowed a period of twelve years only in such cases. In England, the Real Property Limitation Act, 1874, reduced the period prescribed for such a suit from twenty to twelve years. It is therefore not at all probable that the Indian Legislature, while striving to make the Indian law agree with the English law (see Abstract of the Proceedings of the Council of the Governor-General of India on the 19th July 1877) should think of extending the period from twelve years to sixty years. (See the judgment of Parker, J., referring to most of these reasons, in Aliba *v.* Nanu, I. L. R., 9 Mad., 218, at p. 223). A simple mortgagee, as such, cannot sue for foreclosure; an usufructuary mortgagee, as such, cannot sue either for foreclosure, or, for sale (Chattree *v.* Kunjan, I. L. R., 12 Mad., 109, 111); and at the time when Act XV of 1877 was passed, a mortgagee by conditional sale could not, under the Bengal Regulations, institute a *suit* for foreclosure. At the time when the Act was passed, only a mortgagee under an English mortgage could sue for foreclosure or sale in the manner prescribed by Form

What mortgagees may *sue* for "foreclosure or sale?"

109, Sched. IV, Act X of 1877. Art. 147 of Act XV of 1877 was probably intended to apply to such a mortgagee only. In this view, a suit to realize the lien created by a simple mortgage or hypothecation bond is not a suit for foreclosure or sale within the intended meaning of art. 147. This view of the law has been adopted by a Full Bench of the Calcutta High Court, and a Full Bench of the Punjab Chief Court. (Girwar Sing *v.* Thakur Narain, I. L. R., 14 Calc., 730 ; Ramsaran *v.* Mahtab, Punj. Rec., No. 112 of 1890, Rivaz, 4th Ed., p. 234).

Full Bench rulings of the four High Courts.

But as the probability or improbability that such should have been the intention of the Legislature cannot be safely or properly treated as an element in the question (Motiram *v.* Vitai, I. L. R., 13 Bom., 90, at p. 96, F. B.), as the word " or " in " suit for foreclosure *or* sale " must ordinarily be read distributively, and as a suit to realize a lien or charge created by a simple mortgage is virtually a suit for the sale of the mortgaged property, it has been held by a Full Bench of the Allahabad High Court, that a suit upon a bond for money, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest, by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by art. 147. It has been observed by the same Court that art. 132 still applies to a charge which does not amount to a mortgage within the meaning of Act IV of 1882. (Shib Lal *v.* Ganga Prosad, I. L. R., 6 All., 551, F. B). Thus, where of two villages liable to be sold under one and the same mortgage decree, one only is sold, the owner of the village sold is *legally* entitled to a *charge* on the other village in respect of the amount to be contributed by that other. (See sec. 56 of Act IV of 1882). A suit for contribution against the owner of the latter village is governed by art. 132, and the twelve years are to be computed from the date when the sale of the first village was confirmed. (Ibu Husain *v.* Ramdal, I. L. R., 12 All., 110).

Allahabad.

Calcutta (and the Punjab).

A Full Bench of the Calcutta High Court have held (overruling Brojo Lal *v.* Gour Churn, I. L. R., 12 Calc., 111) that a suit on an Indian simple mortgage to enforce payment by sale of the premises is governed by art. 132, and that art. 147 applies only to mortgages in the English form where the mortgagee is entitled to either of the remedies, *viz.*, foreclosure or sale, in the *alternative*. (Girwar Singh *v.* Thakur Narain, I. L. R., 14 Calc., 731, F. B.) See also Nilcomal *v.* Kaminee, I. L. R., 20 Calc., 269). A Full Bench of five Judges of the Punjab Chief Court have recently followed the Full Bench ruling of the Calcutta High Court. (Ramsaran *v.* Mahatab, Punj. Rec., No. 112 of 1890, Rivaz, 4th Ed., p. 234). After the passing of the Transfer of Property Act, it has been held in Calcutta that even a suit for *foreclosure* of a mortgage by *conditional sale* (if the deed contains no provision as to the mortgagee taking *possession*) is a suit to " enforce payment of money " within the meaning of art. 132. (Nilcomal *v.* Kamini, I. L. R., 20 Calc., 269, at p. 272).

Bombay.

The Bombay High Court, in I. L. R., 6 Bom., 719, 723, F. B., observed that it might well be doubted whether art. 132 was intended to apply to mortgages at all, inasmuch as art. 147 had introduced a special provision, not contained in previous Acts, for a suit by a mortgagee for foreclosure or sale. The same Court in a later case (Motiram *v.* Vital, I. L. R., 13 Bom., 90, at p. 95, F. B.) adopted the Full Bench ruling of the Allahabad High Court, and held that art. 147 applied to all mortgages including Indian simple mortgages without possession. The majority of the Court also held that a mere declaration that certain immoveable property was to be a security for a parti-

cular loan, though there was no power of sale given to the mortgagee, was a mortgage within the meaning of Act XV of 1877, and probably of Act IV of 1882. Where certain land was given as security for repayment of a loan, and there was an express provision for sale of the property in case of default, the Bombay High Court treated the bond as a mortgage, and applied art. 147 to a suit for the sale of the mortgaged property. (Bulakhi *v.* Tukarambhat, I. L. R., 14, Bom., 377). The Transfer of Property Act not being in force in Bombay, it has been held that a hypothecation bond with no words of conveyance, no provision about the creditor going into possession, and no express power of sale either through the Court or otherwise is nevertheless a mortgage, and as such governed by art. 147. (See Takaram *v.* Khandoji, 6 Bom., 134, and Onkar *v.* The Firm Govardhan, I. L. R., 14 Bom., 577). See also Venkatesh *v.* Narayan, I. L. R., 15 Bom., 183, where a bond by which the property mentioned therein is only declared to be a security for a loan is treated as a mortgage under art. 147. But a charge created by *act of parties* must somehow be distinguished from a mortgage (art. 147). The Legislature could not have intended that art. 132 should apply only to charges created by operation of *law*. A suit for foreclosure or sale of property in the Mofussil, equitably mortgaged by a deposit of title-deeds in Bombay, is, according to the Bombay High Court, governed by art. 147. An equitable mortgage is more than a mere charge. (Manakji *v.* Rustomji, I. L. R., 14 Bom., 269).

Madras.

In Aliba *v.* Nanu, I. L. R., 9 Mad., 218, the Madras High Court followed an *intermediate* course and held that, under a simple hypothecation bond executed *before* the 1st of July 1882, the date on which the Transfer of Property Act came into force, a claim for the sale of hypothecated property was one to enforce a charge within the meaning of art. 132 of Act XV of 1877. In Rangasami *v.* Mutukumarappa, I. L. R., 10 Mad., 509, a Full Bench of the Madras High Court (practically) followed the ruling in the previous case. It was pointed out by the learned Judges of the Full Bench that the instrument sued on in Shiblall *v.* Ganga Prosad (I. L. R., 6 All., 551, F. B.) was not a mortgage, and that to constitute a mortgage there must be a transfer of some interest of the mortgagor, or an acquisition by the mortgagee of a power to sell the hypothecated property otherwise than through the intervention of a Court of Justice. It may be gathered from the observations of Ayyar, J., in that case that art. 147 would apply to all suits by mortgagees for the sale of mortgaged property, and all such suits by the holders of simple hypothecation bonds executed *after* the 1st of July 1882.

A suit for foreclosure or sale in the case of an usufructuary mortgage by way of conditional sale is in Madras governed by art. 147 and not by art. 132. (Amanna *v.* Gurumurthi, I. L. R., 11 Mad., 64).

Central Provinces.

In the Central Provinces, the rulings in I. L. R., 6 All., 551, and I. L. R., 13 Bom., 90, are followed in preference to the rulings of either the Calcutta or the Madras High Court. (See Ghasiram *v.* Dulichand, 2 Cent. Prov. L. R., 57). It has been held in those Provinces that a suit for declaration of lien or charge on immoveable property and an application for sale in *execution* of the decree so obtained under the former practice is *in effect* a suit for sale under art. 147. (*Ibid.*)

Conflicting opinions as to whether a *rehan* is a *mortgage* at all.

According to Sir Comer Petheram, C. J., a *rehan* or hypothecation bond which does not expressly or impliedly give the lender himself any right to cause the property to be sold, creates only a charge on the property. Other Judges of the Allahabad High Court hold that an ordinary *rehan* is a simple mortgage within the meaning of Acts

IV of 1882 and XV of 1877. (See Sheorattan *v.* Mahipal, I. L. R., 7 All., 258, F. B.) The views of some of the learned Judges of the Bombay and the Madras High Courts (*viz.*, Birdwood, Jardine, and Ayyar, JJ.) agree with the opinion of Sir Comer Petheram, C. J. (See Khimji *v.* Rama, I. L. R., 10 Bom., 519 ; see also Rangasami *v.* Mutukumarappa, I. L. R., 10 Mad., 509 ; Khemji *v.* Rama, I. L. R., 10 Bom., 519, 527 ; Motiram *v.* Vital, I. L. R., 13 Bom., 90). In I. L. R., 6 All., 551, F. B., and I. L. R., 14 Calc., 730, F. B., hypothecation bonds which did not give the creditor any right of entry, or any power of sale otherwise than through the intervention of a Court, were treated as mortgages. (See I. L. R., 10 Mad., p. 514 ; I. L. R., 13 Bom., p. 97). In April 1882, in a case under Act IX of 1871, their Lordships of the Privy Council speaking of a similar *hypothecation* bond say : "That is what is usually called a mortgage bond." (Karan Sing *v.* Bakar Ali, I. L. R., 5 All., 1, at p. 5). In 1892 their Lordships of the Privy Council used the terms hypothecation, charge and mortgage without any distinction. (Kameswar *v.* Rajkumari, I. L. R., 20 Calc., 79, at pp. 83, 84, P. C.) And it is certainly very difficult to suppose that the framers of the Transfer of Property Act intended to exclude from their definition of "mortgage" a large class of instruments which were not only in every day use, but regarded and described by the natives of this country and treated as such by all the Courts of the Mofussil. (Per Sargent, C. J., I. L. R., 13 Bom., 90, at pp. 97, 98). It may be observed that the view that a "simple mortgage" under the Transfer of Property Act must give the mortgagee a power to sell the property without the intervention of a Court of Justice, is somewhat inconsistent with the words "cause the mortgaged property to be sold in cl. *b*, sec. 58 of the Transfer of Property Act, and also with the provisions of sec. 69 of the Act which does not, in the case of a simple mortgage, recognise the validity of a power of sale without the intervention of a Court, except where the mortgagee is the Secretary of State for India in Council, or where the mortgaged property or any part thereof is situate in the towns of Calcutta, Madras, Bombay, Karachi or Rangoon. (See Ghose's Law of Mortgage, 2nd Ed., p. 446). In Kishanlal *v.* Ganga Ram, I. L. R., 13 All., at pp. 47, *et seq.*, Mahmud, J., shews very clearly that a power of sale without the intervention of the Court is *not* necessary to constitute a simple mortgage within the meaning of the Transfer of Property Act. Messrs. Shephard and Brown are also of this opinion. (See Commentaries on the Transfer of Property Act, 3rd Ed., p. 183). Even if it be conceded that an ordinary *rehan* or hypothecation bond is not a "simple mortgage" within the meaning of cl. *b*, sec. 58 of the Transfer of Property Act, 1882, the question remains if an ordinary *rehan* is not a "mortgage" within the meaning of cl. (*a*) of that section. It has been said that the hypothecation itself does not transfer any interest in immoveable property (6 W. R., 318 ; I. L. R., 13 Bom., p. 100). But a suit to enforce an hypothecation is a suit to recover an interest in immoveable property, (Juneswar *v.* Mahabeer, I. L. R., 1 Calc., 163, P. C.), and the charge created by the hypothecation is "an interest in the party in whose favor that charge is made." (Surwan *v.* Shahazada, 9 W. R., 170, at p. 173, F. B. See also Kanchan *v.* Baijnath, I. L. R., 19 Calc., 336, at p. 340 ; and Tukaram *v.* Khandoji, 6 Bom., 134). According to Sir Barnes Peacock, C. J., A. G. Macpherson and C. Hobhouse, JJ., the creditor under a *rehan* may bring an action of ejectment to recover the hypothecated land as a collateral security (9 W. R., 170, at p. 174). Though it has been held in Madras that a charge is not the same as a mortgage in reference to limitation under Act XV of 1877, it is not denied

Power of sale *not* necessary in a simple mortgage.

A hypothecation creates a *real* right, or interest in land.

that a charge created by hypothecation gives the creditor a *real* right available against subsequent purchasers from the debtor. (Kadarsa *v.* Ramiah, 2 Mad., 54).

Is a *rehan* a mortgage under art. 147, Act XV ?

Although before Act XV of 1877 came into operation, a *rehan* or hypothecation bond was often called a mortgage, and although it may still be treated as a mortgage under Act IV of 1882, it may nevertheless not amount to a mortgage, within the meaning of art. 147 of Act XV of 1877.

According to the Full Bench of the Allahabad High Court, (I. L. R., 6 All., 551), the words charge and mortgage in Act XV of 1877 are used in the same sense in which they were used in the Transfer of Property Bill. But as the Bill did not become an Act of the Legislature until 1882, it has been held by some of the learned Judges of the Madras F. B. (I. L. R., 10 Mad., 509, 512, 517), and by all the learned Judges of the Calcutta Full Bench (I. L. R., 14 Calc., 731, 738), that these words in Act XV of 1877 have been used as bearing the meaning ordinarily attached to them at the time when Act XV was passed.

Charge as distinguished from a mortgage under art. 147, Act XV.

It is submitted that where the creditor could not in any event acquire the absolute ownership of the hypothecated property and in default of payment could only cause the property to be sold by judicial process, his right or interest (in 1877) was only a charge as distinguished from a mortgage. On the other hand, in the case of a mortgage as distinguished from a pure *rehan* or hypothecation, the creditor could acquire the absolute ownership of the estate by foreclosure, or by the expiry of the period of limitation prescribed for a suit for redemption. In the case of pure simple mortgages or *rehans*, suits for redemption were then wholly unnecessary and unknown. Though the word "mortgagee" in art. 147, Act XV of 1877, would ordinarily include a simple mortgagee or hypothecatee, it would seem (reading art. 147 with art. 132) that the Legislature in 1877 used the term mortgagee in art. 147 as exclusive of holders of charges howsoever created, and, therefore, as exclusive of simple mortgagees or hypothecatees. In this view a suit by a simple mortgagee or hypothecatee to enforce a charge is not a "suit by a mortgagee for sale" within the meaning of art. 147 of Act XV. If this be the correct interpretation of arts. 132 and 147, it will not be necessary to put an unusual meaning on the word "or" in the expression "suit for foreclosure or sale" in art. 147. It need not be read as meaning "suit for foreclosure or sale in the alternative." It may be read as meaning "suit for foreclosure or suit for sale." And art. 147 will apply to all suits for foreclosure or sale instituted by mortgagees as distinguished from the holders of charges under simple hypothecation bonds. A suit for foreclosure by a mortgagee by conditional sale will in this view be governed by art. 147, at least, where the deed of conditional sale is executed after the Transfer of Property Act came into operation. For it can hardly be denied that the Transfer of Property Act affects (at least, prospectively) the Limitation Act by creating new rights and liabilities in the mortgagor and mortgagee. (See the judgment of Ayyar, J., in I. L. R., 9 Mad., 218). It has been held by their Lordships of the Privy Council that where the mortgagee's right was *extinguished* by the operation of art. 135, the subsequent creation of the right to sue for foreclosure, by Act IV of 1882, could not entitle the mortgagee to institute a suit for foreclosure within the 60 years allowed by art. 147. (Srinath Das *v.* Khettromohun, I. L. R., 16 Calc., 693). The construction of arts. 132 and 147 adopted by the Calcutta High Court would make the twelve years' rule still applicable

"Mortgage" in art. 147, includes English mortgages and conditional sales.

In Calcutta, English mortgages only.

to all suits for foreclosure by mortgagees by conditional sale. See Nilcomal *v.* Kamini, I. L. R., 20 Calc., 269, and see the notes to arts. 135 and 147.

Equitable mortgage.

An "equitable mortgage" by the deposit of title-deeds of immoveable property, where valid, is only a security for the money, and will probably be treated as creating only a charge on the property. It was so treated, at least, in the Mofussil, under the old law. (Peary Mohun *v.* Gobind, 10 W. R., 56; Oo Noug *v.* Moung, I. L. R., 13 Calc., 322). In English law an equitable mortgagee is entitled to a decree for foreclosure. (See Ghose, 2nd Ed., p. 73). An equitable mortgage of immoveable property in the *Mofussil* of Bombay has been treated there as a *mortgage* within the meaning of art. 147 (Manakji *v.* Rustomji, I. L. R., 14 Bom., 269).

What does or does not amount to a charge.

A mortgagee of "all my properties" not being a mortgage of any *specified* property may be treated, at least, as a charge (Ramsidh *v.* Balgobind, I. L. R., 9 All., 158). But where the terms of a bond really come to no more than this that if the money is not paid up upon the due date, the obligee will be entitled by due process of law to recover the amount of the debt from the debtor's property, moveable and immoveable, the bond does not create even a *charge* on the debtor's property. (Collector *v.* Beti, I. L. R., 14 All., 162).

When valid against reversioner.

When a Hindu widow purports to charge land which she held for her widow's estate with payment of a debt, to establish the charge the creditor must satisfy the Court that he had reasonable grounds for believing that the money was wanted for one of the recognised necessities. (Kameswar *v.* Run Bahadur, I. L. R., 6 Calc., 843). If the charge is not established, that is, if for any reason it be found that the charge is not binding on the estate, the creditor in a suit against the *reversioner* cannot claim the benefit of art. 132. (Kameswar *v.* Rajkumari, I. L. R., 20 Calc., 79, P. C.)

Charge on rents and profits.

Money charged on the rents and profits of land is money charged on immoveable property (Muhammad *v.* Chatku, I. L. R., 7 All., 120). An annuity payable out of the *income* of immoveable property has been treated as a charge within the meaning of this article. (Gajpati *v.* Chimman, I. L. R., 16 All., 189).

Charges by operation of *law.*

A charge may be created by operation of law, as well as by act of parties. Under the Transfer of Property Act, one of several mortgagors redeeming the whole of the mortgaged property, acquires a charge on the share of each of the other co-mortgagors for his proportion of the expenses of redemption. (See sec. 95, Act IV of 1882; Moidin *v.* Oothuman, I. L. R., 11 Mad., 416, at p. 418). Under sec. 55 (4) (*b*) of the Transfer of Property Act, a vendor of immoveable property has a charge on the property sold for his unpaid purchase-money; and under sec. 73 of the Act, a mortgagee has a charge on the surplus proceeds of the sale of the mortgaged property sold for arrears of revenue. Charges of this kind are classed in English books as equitable liens. (See Shephard and Brown, 3rd Ed., p. 326). Under sec. 56 of the same Act a similar change arises in favor of the buyer, on the sale of one of two properties subject to a common charge.

Vendor's lien. Arts. 111 and 132.

A suit to enforce a vendor's lien or charge is *specially* provided for by art. 111. But it has been held that a claim to enforce even such a charge against the *land* sold, falls under art. 132. (Virchand *v.* Kumaji, I. L. R., 18 Bom., 48). According to this ruling of Sargent, C. J., and Bayley, J., it would seem that art. 111 is applicable only if the vendor sought to make the vendee *personally* liable. But see notes to art. 111, *supra.*

Charges by act of parties in All. and Bom.

According to the decisions of the Bombay and Allahabad High Courts charges created by operation of *law* only, would seem to be governed by art. 132, and charges created by hypothecation are mortgages within the meaning of art. 147.

Is a co-sharer's liability to contribute, a *charge* by operation of law.

A person who has such an interest in an estate or a dependent talook (as a co-sharer, an undertenure-holder, or a mortgagee) as entitles him to pay the revenue due to the Government, or the rent due to the zemindar, and does actually pay it, is thereby entitled to a charge on the estate or talook, as against all persons interested therein for the amount of the money so paid. (Nagender Chunder *v.* Kamini, 8 W. R., P. C., 17; Enayet Hossein *v.* Muddun, 22 W. R., 411; Ramdutt *v.* Horakhnarain, I. L. R., 6 Calc., 549; Mohesh *v.* Ram Prosunno, I. L. R., 4 Calc., 539 (S. C.); 6 C. L. R., 28; Deo Nundun *v.* Deshputty, 8 C. L. R., 210). If the amount is sought to be charged on the land, it may be sued for within twelve years under art. 132. (See I. L. R., 6 Calc., 549; and the notes to art. 99. See also Achut Ram *v.* Hari Kamti, I. L. R., 11 Bom., 313; Seshagiri *v.* Pichu, I. L.

Conflict of opinion.

R., 11 Mad., 452). But it has been held by Prinsep, Wilson and Tottenham, JJ., (Mitter and Norris, JJ., dissenting) that in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer (Kinuram Dass *v.* Mojaffer Hossein, I. L. R., 14 Calc., 809, F. B.) In Seth Chitor *v.* Shiblal, I. L. R., 14 All., 273, at p. 298, F. B. Edge, C. J., Tyrrell, Knox and Blair, JJ., approved the ruling of the majority of the Judges in the Calcutta Full Bench case. Mahmud, J., expressed his adherence to the views held by Mitter and Norris, JJ., (I. L. R., 14 All., at pp. 305, *et seq.* And in Seshagiri *v.* Pichu, Kernan and Ayyar, JJ., agreed with Mitter and Norris, JJ., and held that such payment did create a charge. (I. L. R., 11 Mad., 452). In Madras a distinction is made between a payment of the whole *revenue* and a payment of the whole *rent* by a co-sharer. In the latter case a suit for contribution by such co-sharer is governed by art. 99, and not by art. 132. (Thanikachella *v.* Shudachella, I. L. R., 15 Mad., 258). Under the provisions of sec. 171 of the Bengal Tenancy Act, money so paid to prevent the sale of a tenure for arrears of rent is deemed a mortgage-debt. See also sec. 62 of Act VIII of 1869, B. C. But

Right to contribution is *generally* a personal right.

in the generality of cases, the right to contribution is a personal right, and the remedy is a personal one, and there is no lien for the amount of the monies in respect of which the right to contribution arises. This was determined by Lord Eldon after great consideration in the case of part-owners of a ship, in *ex-parte* Young and *ex-parte* Harrison in which he overruled the previously expressed opinion to the contrary of Lord Hardwicke. (*In re* Leslie *v.* French, 23 Ch. D., 552, 563; see also Falcka *v.* Scottish I. I. Co., 34 Ch. D., 234).

Interest as such.

A suit for interest, which has been made a charge upon immoveable property, is a suit for money charged upon such property, and is governed by this article. (See notes under art. 63). But where the charge amounts to a mortgage within the meaning of arts. 147 and 148, sixty years' interest may be taken into account, provided it appears from the deed that it was the intention of the parties that interest as interest should be payable until the mortgage-debt was actually paid off. In a redemption suit the Bombay High Court allowed the mortgagee more than 50 years' interest from the date of the mortgage to the date of the decree. (Daudbhai *v.* Daudbhai, I. L.

By way of *damages*.

R., 14 Bom., 113). Interest by way of *damages*, for a breach of a registered contract to pay on the due date, cannot be recovered after

six years from the date of the breach (Mansab *v.* Gulab, I. L. R., 10 All., 85, at pp. 90 and 92. See also Parashram *v.* Gossai, 8 Cent. Prov. Law Rep., 95). At the *date* when the contract for the payment of the principal was broken, *damages* by way of interest could not (not having been ascertained and decreed by the Court) be treated as a *charge* on the hypothecated property (Bhagwant *v.* Daryao, I. L. R., 11 All., 416). See also Sri Newaz *v.* Udit, I. L. R., 13 All., 330 ; Gudri *v.* Bhubaneshwari, I. L. R., 19 Calc., 19. It has been held in the Punjab that when the claim for such damages (*i.e.*, interest *post diem*) is within time under art. 115 or art. 116, the amount may be charged upon the mortgaged property. (Sheo Chund *v.* Chunna, Punj. Rec., No. 73 of 1892 ; Rivaz, 4th Ed., p. 130). For other cases on this subject, see p. 703, *supra*. It has been held in Madras that an *implied contract* to pay interest *post diem* may be inferred from the acts and conduct of the parties and that such interest, though for more than six years, may be recovered by sale of the mortgaged property. (Sundara *v.* Sama, 4 Mad. L. J., 260). Reasonable interest awarded under Act XXXII of 1839 may also be recovered as a charge on the mortgaged property. (Rama Reddy *v.* Abbaji Reddy, 4 Mad. L. J., p. 265 ; Bikramjit *v.* Durga, I. L. R., 21 Calc., 274).

Interest *ad diem*, and damages *post diem*.

Interest under Act 32 of 1839.

The rule of *damdupat*, where it applies, is not affected by the Acts of Limitation. In such cases the amount of interest to be awarded by the decree cannot exceed the principal. (Hari Mahadji *v.* Balambhat, I. L. R., 9 Bom., 233).

Rule of *damdupat*.

A suit to enforce a charge created by a mortgage-bond, against a party who holds the lands under a title distinct from that of the mortgagor, is not governed by this article, but by art. 144. (See Karan Singh *v.* Bakar Ali Khan, I. L. R., 5 All., 1, P. C.) Art. 132 does not perhaps apply to cases falling within art. 111. (But see I. L. R., 18 Bom., 48). Art. 132 does not govern suits for money charged upon moveable property. A suit to enforce payment of money charged upon moveable property is governed by art. 120. (Branson's Digest of Unreported Bombay Judgments, 219. (See also Nimchand *v.* Jagobandhu, I. L. R., 22 Calc., 21). But see Vitla *v.* Kalikara, I. L. R., 11 Mad., 153, and notes to art. 80, *supra*.

Where art. does not apply.

Malikana.—A malikana right is generally the right to receive from the Government a sum of money, which represents the malik's share of the profits of an estate not permanently settled, when from his declining to pay the revenue assessed by the Government or from any other cause, his estate is taken into the khas possession of Government, or transferred to some farmer or ijaradar. (See Mullik *v.* Muleka, I. L. R., 10 Calc., 1112, 1125). As to suits for malikana, see Nursing *v.* Mussamut Ammeeran, 22 W. R., 551, in which it was held that a payment by one of two holders of the land charged, within twelve years saved the claim against both. See also Hurmuzi *v.* Hirdaynarain, I. L. R., 5 Calc., 921, in which it was held that in a suit for malikana, the twelve years are to be computed not from the time of the last payment, but from the time when the money sued for became due. In this case art. 132 was applied to a suit for malikana against the plaintiffs' cosharers who had collected the whole amount from the party liable to pay it. But art. 62 was more properly applicable to the case. (See Harmukh Gouri *v.* Harisuk, I. L. R., 7 Bom., 191 ; Dulabh *v.* Bansi, I. L. R., 9 Bom., 111 ; Raoji *v.* Bala, I. L. R., 15 Bom., 135, at p. 141).

Malikana, and *kaqqs*.

Art. 62 when applicable.

In Gopinath *v.* Bhugwat, I. L. R., 10 Calc., 697, the applicability or otherwise of arts. 120, 131 and 144 to suits for malikana has been considered by Mitter and Norris, JJ.

Haqqs are monies *deemed* to be charged on land.

Suits for malikana and *haqqs* are ordinarily suits for mere *money* decrees (Lallubhai *v.* Narain, I. L. R., 6 Bom., 719, 724), although, for the purposes of art. 132, the allowances and fees so called are deemed to be money *charged* upon immoveable property. According to Spankie, J., the *haqqs* referred to in the Explanation are fixed charges upon immoveable property, payment of which may be enforced by the sale of the property so charged, and *haqq-i-chaharam* (a zemindari due *customarily* payable on the sale of a house situated in the mehal) is not a *haqq* within the meaning of this article (Kirath *v.* Gonesh, I. L. R., 2 All., 358, 361). The decision of the Privy Council in Ramdin's case (I. L. R., 7 All., 502) does not lay down that all *haqqs* are actually charged upon immoveable property, or that their payment may be enforced out of some immoveable property. In a case referred to in Government *v.* Kallianrai, 14 Moore I. A., 551, their Lordships of the Privy Council expressed a doubt as to whether a palkhi *haqq* was a charge on immoveable property. In Maharana Fattehsangji *v.* Desai Kallianraiji, 21 W. R., 178, P. C., it was held that the payment of Tora Garas *haqqs* was not a mere personal liability, but an interest in immoveable property. In many cases fees attached, as of right, to hereditary offices are known as *haqqs*. If there is no immoveable property out of which a particular *haqq* allowance may be realised, a suit for the recovery of such an allowance is nevertheless governed by art. 132. The *haqq*, whether actually charged upon immoveable property or not, cannot be treated as coming under any of the articles relating to bonds and contracts. The ruling in Ramdin's case must be held to apply only where the suit is based on a *contract*, and is for money *actually* charged upon immoveable property, and *not* for money *deemed* to be charged upon such property.

Haqdar *versus* third persons.

This article applies to suits which are brought by a *haqdar* against the person originally liable for payment of the *haqq*, and not to suits against third persons who have accually realised the *haqq* which was payable to the plaintiff. A suit of the latter description is a suit for money had and received under art. 62. (Harmukhgouri *v.* Harisukprosad, I. L. R., 7 Bom., 191 ; Morbhat *v.* Gangadhar, I. L. R., 8 Bom., 234 ; Desai *v.* Desai, I. L. R., 8 Bom., 496 ; Dulabh *v.* Bansi, I. L. R., 9 Bom., 111 ; Ravji *v.* Bala, I. L. R., 15 Bom. 135. Cf. I. L. R., 5 Calc., 921).

Arrears of annuity charged on land.

A plaintiff whose *right* to receive an annuity out of the income of certain immoveable property had been established, could sue for *arrears* of such annuity for twelve years preceding the suit, although he failed to prove that he and his predecessor in title had received payment of the annuity since the date when the right was first established. The principle of the ruling in Chhagunlal *v.* Bapubhai, I. L. R., 5 Bom., 68 (see notes to art. 131) is applicable to such a suit. (Gajpat *v.* Chimman, I. L. R., 16 All., 189).]

Art. 133.	133.—To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Twelve years	...	The date of the purchase.
Art. 134.	134.—To recover possession of immoveable property conveyed or bequeathed in trust or	Ditto	...	Ditto.

mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration.

[Nos. 133 and 134. (Nos. 133 and 134, Act IX ; sec. 5, Act XIV).

These articles are now expressly made applicable to trusts created by *will*. (See p. 189, *supra*). It is no longer necessary that the purchaser, in order that he may be protected by these articles, should be a purchaser in good faith. (See p. 189, *supra*, and the notes to sec. 10). These articles of Act XV apply even where the purchase is not in good faith. (Baivakhan *v.* Bhiku, I. L. R., 9 Bom., 475). It would seem that the words " in good faith " which appeared in the corresponding article of Act IX of 1871 were omitted from this article to exclude the possible inference that absence of notice of the real owner's claim was necessary to enable a purchaser to avail himself of the provisions of this article. (See Yesu *v.* Balkrishna, I. L. R., 15 Bom., 583, at p. 585). At all events, it has been held that *constructive* notice of the restricted nature of the vendor's title does not disentitle the purchaser to plead limitation under art. 134. But actual knowledge of the vendor's title (derived, say, from the vendor's representation of his real title as mortgagee) and a belief on the part of the vendee that what he is purchasing is *not* an absolute title would prevent the application of art. 134. (Pandu *v.* Vithee, I. L. R., 19 Bom., 141, at pp. 143, 144). Such a vendee or purchaser does not buy the property as an *absolute* property, and does not differ from an assignee of the mortgagee's rights. The mortgagor's suit against such a purchaser is governed by art. 148. The purchase must purport to be a purchase of the property as an absolute property, and not merely as property mortgaged, deposited or entrusted. In the case of mortgaged property, for instance, it must not purport to be a mere assignment of the mortgage ; and the *onus* is on the purchaser to show this. (See pp. 111, 148, 189, *supra ;* Bhagwan *v.* Bhagwan, I. L. R., 9 All., 97). If the mortgagee, instead of selling the property, mortgages it as if it were his absolute property, and if the mortgage cannot be treated as a sale within the meaning of art. 134, art. 144 must be held to be applicable to the case. But it has been held by the Bombay High Court that such a mortgage by the mortgagee is a " purchase " within the meaning of this article (see below).

Purchase need not be in good faith.

But must be of an *absolute* property.

Is mortgage a sale ?

Arts. 133 and 134 do not provide for the case of purchasers from *mortgagors ;* nor for the case of purchasers who buy property in good faith from a person guilty of concealed fraud under sec. 18 ; nor for the case of purchasers from lessees for a term of years, or from grantees of lands for life ; nor again for the case of a trespasser against an usufructuary mortgagee. (See pp. 142, 148—154, *supra ;* and the notes to sec. 18, at p. 617, *supra*).

Where arts. do not apply.

An execution purchaser of the rights and interests of a grantee of lands for her own life (although such grant makes the grantee a trustee for some purposes) cannot in a suit by the grantor or his representatives for possession of the lands, after the death of the guarantee, rely on art. 134. (Kalidas *v.* Kunhyalall, I. L. R., 11 Calc., 121, at p. 131, P. C. See arts. 140 and 144). Art. 134 cannot apply to a purchase of the mortgagee's rights at an execution sale. (See Bhagwan *v.* Bhagwan, I. L. R., 9 All., 97, at p. 103 ; and Pandu *v.* Vithu, I. L. R., 19 Bom., 140, at p. 144). In Chintamoni *v.* Sarup, I. L. R., 15 Calc., 703, it was held that an auction sale in execution of a decree against a trustee was a sale or assignment within the meaning of sec.

Do *execution*-sales fall under these arts. ?

10, but the question whether art. 134 or art. 144 applies to the purchaser, or assignee at such a sale was left undecided. A purchaser at a Court sale in execution of a decree against the mortgagee may be protected by art. 134, if what passed by the sale was an *absolute* title to the property and not merely *the rights* of the mortgagee. (See Muthu *v.* Kambalinga, I. L. R., 12 Mad., 316, at pp. 319, 320).

Purchased for value.

The words "purchased" and "bought" in these articles mean purchased and bought from the trustee, depositee, pawnee or mortgagee on the representation and in the belief that the transferor had an absolute, and not a restricted title. (See Radhanath *v.* Gisborne, 15 W. R., P. C., 24, as explained in I. L. R., 18 Bom., p. 584, and I. L. R., 19 Bom., p. 144). The expression "purchaser for value" is a technical expression. It has been held that the right transferred to the purchaser need not amount to full or absolute ownership. A *mortgage*, as well as an out and out sale, by the trustee or mortgagee is a "purchase" within the meaning of art. 134. (See Yesu *v.* Balkrishna, I. L. R., 15 Bom., 583, at pp. 584, 585). On the same principle a *lease* for value granted by the trustee or mortgagee will probably be protected by art. 134. (See Attorney-General *v.* Davey, 4 DeG. and J., 136; Lewin, 9th Ed., 998). But a transfer purporting to be a mortgage of the *mortgage interest* of the mortgagee, and not of the entire property in the land, does not entitle the sub-mortgagee to plead limitation under art. 134, for the sub-mortgagee in such a case does not take the property in the belief that the transferor had an absolute title. (See Savala *v.* Genu, I. L. R., 18 Bom., 387).

Mortgages and leases included.

Deposit.

Property *deposited* is recoverable *in specie*. (Ishur *v.* Jibun, I. L. R., 16 Calc., 25, 29). Sec. 25 of 3 and 4 Will. IV, Ch. 27, protects purchasers from *express* trustees only. Art. 134 *may* be read with sec. 10 and confined to trusts for a specified purpose (see I. L. R., 9 Bom., 373, at pp. 399, 400). These articles apply only to suits brought by the *cestui que trust* (or depositor, pawnor or mortgagor) to recover property from the hands of those who have purchased it from a trustee (depositee, pawnee or mortgagee). See Mohunt *v.* Kashee, 20 W. R., 471. A sale by the mortgagee even after he has obtained a decree for possession as such, is within the purview of art. 134. (See I. L. R., 19 Bom., 140).

Suit *by* whom.

Time allowed by sec. 10, and arts. 145 and 148 reduced.

These articles reduce to twelve years the periods to which the depositor, pawnor or mortgagor would be otherwise entitled under arts. 145 or 148. (See Muthu *v.* Kambalinga, I. L. R., 12 Mad., 316, at p. 318). They also affect the provisions of sec. 10. Neither the original mortgagee nor his son can rely on the twelve years' rule of limitation unless he can prove a subsequent valid purchase of the equity of redemption. (Byari *v.* Puttanna, I. L. R., 14 Mad., 38). Even where the mortgagor is ignorant of the sale of his property by the mortgagee, he cannot (under art. 134) redeem and recover the property from the purchaser unless he brings his suit within twelve years from the date of the sale of which he knew nothing. (See Pandu *v.* Vithu, I. L. R., 19 Bom., 140, at p. 141). Under art. 148, the mortgagor has sixty years to bring a suit to redeem or recover the property from the mortgagee. He has also sixty years (from the date of the mortgage) against an *assignee* of the rights of the mortgagee, *i.e.*, against a person who takes a mortgage with a clear and distinct understanding that it is nothing more than a mortgage. (See Bhagwan *v.* Bhagwan, I. L. R., 9 All., 97, at p. 102). But the sixty years allowed by art. 148 are reduced to twelve years under art. 134, if the purchaser is a person who purchases that which is *de facto* a mortgage upon the representation made to him, and in the belief that it is an *absolute* title. (Pandu *v.* Vithu, I. L. R., 19 Bom., 140, at p. 144).

Plaintiff's ignorance of sale.

Sec. 5 of Act XIV of 1859 *expressly* provided that in the case of a purchase from a depositary, pawnee, or mortgagee, no suit for the recovery of the property from the purchaser should be maintained, unless brought within the time allowed for such a suit against the depositary, pawnee, or mortgagee, himself. (See Ram Dhun *v.* Guneshee, 16 W. R., 96). This proviso has been omitted in the Acts of 1871 and 1877, probably as unnecessary. Arts. 133 and 134 confer a *privilege* on purchasers for value, and can *not* deprive them of their ordinary right to represent their vendors and claim the benefit of arts. 145 and 148.]

Suit *within* twelve years of purchase, *may* still be barred by art. 145 or 148.

135.—Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	Twelve years	... When the mortgagor's right to possession determines.	Art. 135.

[No. 135. (No. 135, Act IX). See the notes to art. 146 which applies to suits for possession by the mortgagee in Courts established by Royal Charter when such suits are brought against the mortgagor. Art. 135 does not mention against whom the suit must be brought in order that it may apply to it.

Old law.

See pp. 148—153, *supra*, as to *adverse* possession in respect of property under mortgage. Under Act XIV of 1859, and under the Regulations, the period of limitation was computed from the time when the mortgagee's "cause of action" accrued or *practically* from the time when the defendant's possession became *adverse* to the mortgagee.

Law before Act IX of 1871.

In suits to which art. 135 of Act IX of 1871 applied, the question when the plaintiff's cause of action arose, or when the defendant's possession became *adverse* to the plaintiff did not arise. It is the same under this article of Act XV. (Lalmohun *v.* Prosunno, 24 W. R., 433 ; Shurnomoyee *v.* Srinath Das, I. L. R., 12 Calc., 614, at pp. 619 and 620 ; Srinath Dass *v.* Khetter Mohun, I. L. R., 16 Calc., 693, P. C.) For the law before Act IX of 1871 came into operation, see Dinonath *v.* Nursingh, 22 W. R., 90 ; Mussamut Mankee Kooer *v.* Shaikh Minno, 22 W. R., 543. Where the mortgagee was entitled to sue for possession before foreclosure, and the defendant was a *bonâ fide* purchaser without notice of the mortgage, and as such held the property *adversely* to the mortgagee, foreclosure did not entitle the mortgagee to a fresh start. (See Anundomoyee *v.* Dhonendro and Brojonath *v.* Khelat Chunder, 16 W. R., P. C., 19 and 33 ; Dinnonath *v.* Nursing, 22 W. R., 90).

No time for taking foreclosure proceedings against mortgagor under the Regulations.

On the other hand, when the defendant claiming under the mortgagor did not advance a title inconsistent with the mortgage, but asserted only a title to redeem the mortgage, foreclosure proceedings under the Regulations, taken after the expiry of twelve years from the date of default, were not in any case too late (see p. 148, *supra*, and Prannath *v.* Rookea, 4 W. R., P. C., 37 ; Mussamut Manku *v.* Shaikh Munoo, 22 W. R., 543). The mortgagee had no cause of action unless possession was withheld from him *adversely*. In fact, as against persons claiming the equity of redemption only, no time had been prescribed by the law for taking foreclosure proceedings under the Regulations. (See Dinonath *v.* Nursing, 22 W. R., 90, at p. 94 ; Buldeen *v.* Golab, 1867, Agra F. B., 102). In the case of execution purchasers or other alienees by act of law, in exclusive possession of mortgaged property without notice of the mortgage, the law applicable between mortgagor and mortgagee did not apply. (Anandomoyee *v.* Dhonendro, 16 W. R., P. C., 19. See p. 563, *supra*). As to when the possession of an

alienee from the mortgagor, especially where such alienation was not a voluntary act of the mortgagor, became adverse to the mortgagee, see p. 148, *supra*. In Manly *v.* Patterson, I. L. R., 7 Calc., 394, the rule laid down by the Privy Council in Anundmoyie's case (see p. 563, *supra*) was held to be not applicable where there was no apparent change of ownership, and the mortgagor continued in ostensible possession notwithstanding the sale of his rights in execution. It may be added that the rule itself is of an exceptional character, and that a purchaser at an ordinary judicial sale, under a mere money-decree, cannot in every case be regarded as a *bonâ fide* purchaser of an absolute interest without notice (Shobagchand *v.* Bhoichand, I. L. R., 6 Bom., 193, 205, F. B.) As to transfer by pre-emption, see p. 564, *supra*.

Does art. 135 apply when the property is in possession of a *third* person ?

Art. 135 applies to suits against the mortgagor or his legal representatives, as well as those against subsequent purchasers from the mortgagor, (I. L. R., 12 Calc., 614), probably even when such purchasers had no notice of the mortgage. But does the article include a mortgagee's suit to recover possession of the mortgaged property when such property is held by a trespasser adversely to the mortgagor and mortgagee ? In Ram Coomar *v.* Prosunno, W. R., 1864, (Gap Number), p. 375, it was held that under the old law in a mortgagee's suit against the trespasser the twelve years were to be computed from the date the trespasser obtained adverse possession of the mortgaged estate, and not from the date of default, or the date of the expiry of the year of grace under Beng. Reg. 17 of 1806. It was suggested in this case that if the mortgagor contested the title of the adverse holder and litigation ensued between them, the mortgagee was not bound to take action upon his mortgage until that litigation was decided. If the trespasser's possession commenced before the mortgagee's right to possession accrued, it is apprehended, the trespasser's possession did not become adverse to the mortgagee, until that date. (See p. 153, *supra*). If art. 144 applies to such a suit against a trespasser, time will probably run from the time when the mortgagee was first entitled to possession. But Pigot and O'Kinealy, JJ., in Sharnomoye's case were of opinion that art. 135 bars the mortgagee's suit for possession against the mortgagor himself or *anybody* else. (I. L. R., 12 Calc., 614, at p. 620). If art. 135 applies to the suit against a trespasser, time will run from the date when the mortgagor's right to possession determines. It may be observed that the case of a trespasser is stronger than even that of a purchaser in possession without notice of the mortgage. It has been held in the Central Provinces that this article does *not* apply where the mortgagor has been *dispossessed* by his landlord in execution of a decree for arrears of rent, and that the mortgagee's suit for possession after foreclosure in such a case is governed by art. 144. The ruling in I. L. R., 10 Calc., 68, does not apply to cases where the mortgagor has been *dispossessed* by a third party. (Gopala *v.* Musst. Gora, 4 Cent. Prov. L. R., 99).

Act IX of 1871 as *amended* by Act XV.

Under Act IX of 1871, art. 135 gave a period of twelve years from the time when the mortgagee was "first entitled to possession." This very unfortunate provision in the Act of 1871 has been corrected by the Act of 1877. (Ghinarain *v.* Ram Monoruth, 7 C. L. R., 580, 581). This amendment was intended to meet the case of the mortgagor and mortgagee agreeing to go on upon the footing of the mortgage after the mortgage term has expired. (See the final report of the Select Committee on the Limitation Bill, dated 13th June 1877). Mr. Starling thinks that the two expressions in the two A cts are practically synonymous. (Starling, 3rd Ed., 274, 275). But under

the present Act, the payment and acceptance of interest, or a part of the principal, will, as evidence of the *continuance* of the relation between the parties created by the deed of mortgage, entitle the mortgagee to count the twelve years from the date of the *last payment*. (Srinath Das *v.* Khettro Mohun, I. L. R., 16 Calc., 693, at p. 701, P. C.) It may, however, be otherwise when the defendant is a purchaser from the mortgagor of a part of the property without notice of the mortgage, and not a party to the new arrangement by which the mortgagor is permitted to retain possession notwithstanding the default. (See Brojonath *v.* Khelat, 16 W. R., P. C., 33, 35); p. 149, *supra*).

Mortgagor's right to possession when *determined*.

The mortgagor's right to possession determines, at the time (whether on default *on* the due date, or *before*) when the terms of the mortgage entitle the mortgagee to take possession; or if the parties (expressly or impliedly) agree to go on upon the footing of the mortgage, at the time when such agreement (proved by *direct* evidence, or *inferred* from the conduct of the parties and other circumstances) comes to an end; or if the mortgage does not entitle the mortgagee to take possession before foreclosure, at the time when the mortgage is foreclosed. Where the mortgagee is entitled to take possession from the date of the mortgage, he may bring his suit within twelve years from that date (Ram Chand *v.* Gyan Chand, Punj. Rec., No. 134 of 1883; Starling, 3rd Ed., 276; Hikmatullah *v.* Imam Ali, I. L. R., 12 All., 203). Under Act IX of 1871, time commenced to run even if the mortgagor remained in possession with the *permission* of the mortgagee. (Lall Mohun *v.* Prosunno, 24 W. R., 433). Under Act XIV of 1859 it was *otherwise* (I. L. R., 12 Calc., 614). And under Act XV of 1877, if a mortgagee entitled to possession receives interest from and permits the mortgagor to continue in possession as such mortgagor, time will probably run from the time when the mortgagor's right to such possession is determined.

Effect of a foreclosure.

It should be remembered that a foreclosure is considered as a new purchase of the land, and that the effect of an order of foreclosure is to vest the ownership and beneficial title to the mortgaged land for the first time in the mortgagee; so that an action for possession as owner brought within the ordinary period next after the order of foreclosure (against the mortgagor himself or any person who claims or is entitled to claim the equity of redemption only), is not barred by limitation, although more than the ordinary period has elapsed since the mortgagee was first entitled to possession. (See Pugh *v.* Heath, 6 Q. B. D., 345; S. C. on appeal, 7 App. Cas., 235). The effect of a purchase of the mortgaged property under a power of sale is analogous to that of a foreclosure decree. (Purmanond *v.* Jamna, I. L. R., 10 Bom., 49, 56).

Possession as mortgagee, and possession as owner.

There can be no two things more distinct or opposite than possession as mortgagee, and possession as owner of the estate (*ibid.*) The recovery of possession by the mortgagee as mortgagee does not extinguish the incumbrance, whilst redemption by the mortgagor or foreclosure by the mortgagee undoubtedly has such effect. (Shiblal *v.* Ganga, I. L. R., 6 All., 551, at p. 559). When the mortgagee takes possession of the mortgaged property, not as owner after foreclosure, but as mortgagee, by way of lien under the terms of the deed of mortgage, he is accountable to the mortgagor for the profits which he receives. (22 W. R., 90, at p. 92). Z enters into possession of an entire estate as mortgagee, under an usufructuary mortgage executed by two out of three cosharers of the estate. Z subsequently purchases the rights of the third cosharer who was out of actual possession at the date of the mortgage. The subsequent purchase cannot *ipso facto* change the character of Z's possession from that of a mortgagee to that of an owner of the one-third

share (Nundo *v.* Judonath, I. L. R., 14 Calc., 674, see p. 149, note, *supra*). But see Byari *v.* Puttanna, I. L. R., 14 Mad., 38.

Suits to which article applies.

The suit provided for by art. 135 is a suit by the mortgagee for possession *as mortgagee*. (Ghinarian *v.* Ram Monoruth, I. L. R., 6 Calc., 566 (note); S. C., 7 C. L. R., 580; Barmomoyee *v.* Dinobundhoo, I. L. R., 6 Calc., 564). The article applies to usufructuary mortgagees (see I. L. R., 6 All., 551, at p. 559), as well as to English mortgages and mortgages by conditional sale if the mortgagee is entitled to take possession before foreclosure. In Bengal, so long as Reg. VII of 1806 was in force, foreclosure *suits* in respect of *mofussil* mortgages were unknown, and the only suit open to the mortgagee was a suit for possession to which art. 135 would apply. (Shurnomoyee *v.* Srinath, I. L. R., 12 Calc., 614; on appeal, I. L. R., 16 Calc., 643). It has been held that if a mortgagee, who may, under the terms of the mortgage, on default of payment, or otherwise, sue for possession as mortgagee, within the time allowed by this article, commences foreclosure proceedings under Beng. Reg. 17 of 1806, and thus takes steps to alter his position or character within such period, he will, under art. 144, be entitled to another twelve years from the date of such change of character. (7 C. L. R., 580, 581). In Madun Mohun *v.* Ashad Ali, I. L. R., 10 Calc., 68, the Court observed that unless the mortgagee's character is changed into that of an absolute owner (by the expiry of the year of grace under the Regulations) within the twelve years allowed by art. 135, he cannot, even in a suit for possession (as owner) against the mortgagor himself, claim a fresh start from the date of foreclosure. But in Pugh *v.* Heath, 6 Q. B. D., 345, in which a mortgage, in England, had been absolutely *foreclosed* shortly after the expiry of the ordinary period of limitation allowed to a mortgagee to sue for *possession*, Lord Selborne laid down generally that the order of foreclosure gave the mortgagee a fresh start to sue for possession as absolute owner. Lord Selborne's views were upheld on appeal to the House of Lords (see 7 App. Cas., 235).

Application for foreclosure under Regulation how affected by art. 135.

Where mortgagee is *not* entitled to possession *before* foreclosure.

Where under the terms of the mortgage, the mortgagee is not entitled to possession as mortgagee on default of payment on the due date, or otherwise, art. 135 is not applicable, and it has been held that his suit for possession as owner against the mortgagor or his representatives is not barred, simply because the foreclosure proceedings under the Regulations were taken more than twelve years after the date on which the mortgage money was repayable. The law under the Acts of 1871 and 1877 does not in this respect differ from the old law. In the case of mortgages of this class, the mortgagee has no right to any kind of possession until he has perfected his title by foreclosure, and limitation does not begin to run against him until the year of grace allowed by the Regulations has expired. (Noonoo *v.* Lalla, 1 Shome, 21; Modun Mohun *v.* Ashad Ali, I. L. R., 10 Calc., 68. But compare Murlidhur *v.* Kanchan, I. L. R., 11 All., 144, where Edge, C. J., and Tyrell, J., observed that even under Act XIV of 1859, the mortgagee was in every case bound to sue for possession within twelve years of the date of the mortgagor's default). Where the terms of the mortgage entitle the mortgagee to sue for possession, before foreclosure, and his right to possession is extinguished by the expiry of the twelve years allowed by art. 135, his right to take foreclosure proceedings under the Regulation is also extinguished, (Girwar *v.* Thakur, I. L. R., 14 Calc., 730, at p. 736, F. B.; Shurnomoye *v.* Srinath Dass, I. L. R., 12 Calc., 614), and foreclosure proceedings taken after the expiry of the twelve years will not give him a fresh right to sue for possession even as absolute owner. When the mortgagee's suit for possession is barred by art. 135, his right to possession *as mortgagee* is, no doubt, extinguished by sec. 28; but his right to take

Where he *is*.

foreclosure proceedings, or his right as absolute owner after foreclosure, under the Regulations can hardly be extinguished by sec. 28 of the Act. (See Rivaz, 4th Ed., p. 199, and Rallia Ram *v.* Sundar, Punjab Record, No. 83 of 1883). But whether sec. 28 applies or not, it has in substance, been held by the Privy Council that when a mortgagee's suit for possession is barred by art. 135, and no effectual foreclosure proceedings have been taken under the Bengal Regulations before it is so barred, his right to possession is *wholly* extinguished and the property freed from the mortgage. It may be mentioned here that a mortgage in English form between natives, of lands in the mofussil outside Calcutta, was always treated as a mortgage by conditional sale. (See I. L. R., 12 Calc., 614, at p. 616). In Madras, it has been held that if a mortgagee by conditional sale does not recover possession on his footing as mortgagee within twelve years from the date of his dispossession by the mortgagor, he does *not* thereby lose his right to sue for foreclosure and possession under sec. 87 of the Transfer of Property Act. (Ammana *v.* Gurumurthi, I. L. R., 16 Mad., 64).

Madras ruling.

Where art. 135 is applicable, and the mortgagee has perfected his title against the mortgagor by foreclosure under Reg. XVII of 1806, within the 12 years allowed by that article, the mortgagee's suit for possession (founded on the title so perfected) as against the mortgagor himself or as against a person who purchased the whole or a part of the mortgaged property after the mortgagee's application for foreclosure, is not open to the objection of limitation, if it is brought within twelve years of the date of such foreclosure. But as against persons who purchased portions of the property before the application for foreclosure, and who were not served with notices of foreclosure, the mortgagee's right to possession is wholly extinguished, if the suit is not brought within twelve years of the date of default or at the latest, within twelve years of the date of the last payment of interest or a part of the principal of the mortgage money. The subsequent creation (in the mofussil of the Bengal Presidency) of *suits* for foreclosure by the Transfer of Property Act, cannot revive the mortgagee's extinct right, or affect any right of the purchasers to unincumbered ownership which arose before the 1st of July 1882 out of the legal relations between the mortgagor and the mortgagee. (Srinath Das *v.* Khetter Mohun Sing, I. L. R., 16 Calc., 634, P. C.; S. C. in the High Court, I. L. R., 12 Calc., 614).

Srinath Dass *v.* Khetter Mohun Sing, (P. C., 1889).

If no proceedings were taken under the repealed Regulation and the right of the mortgagee to possession was *not extinguished* before the 1st of July 1882, the mortgagee may, it has been held, in the Central Provinces, sue for foreclosure within the period allowed by art. 147. (See Jago Mohun *v.* Chaitu, 8 C. P. L. R., 65). Murat Sing *v.* Ramlal, 8 C. P. L. R., 83, follows the Privy Council ruling in a case in which the mortgagee's suit for possession under art. 135 was *barred* before the 1st of July 1882. It has been held in Bengal that a suit for foreclosure of a mortgage by conditional sale, when such a suit may be brought under the Transfer of Property Act, is governed either by art. 132 or by art. 135, and that art. 147 is not applicable to such a suit. (Nilcomal *v.* Kamini, I. L. R., 20 Calc., 269). In this last case, it has been held by Pigot and Banerji, JJ., that where the mortgage deed contains no provisions as to the mortgage taking possession (art. 135 being inapplicable), art. 132 must be applied to such a suit for foreclosure in Bengal, where the Courts are bound by the Full Bench ruling in Girwar Sing *v.* Thakur Narain, I. L. R., 14 Calc., 730, F. B. See notes under art. 147.

Suits for foreclosure of conditional sales, under Act IV of 1882.

Local extent of Reg. 17 of 1806.

The question whether foreclosure under Beng. Reg. XVII of 1806 gave the mortgagee a fresh right to sue could not arise in the Bombay or the Madras Presidency. Even as regards the Bengal Presidency it may be observed that since the enactment of the Transfer of Property Act 1882, the Regulation is in force only in the Punjab, the Sonthal Pergunnahs, and possibly in Chota Nagpore. (See Macpherson's Bengal Code, 2nd Ed.) As to suits for foreclosure, see notes to arts. 132 and 147.

Fresh right to sue for possession by second mortgagee.

When there are two different mortgages of the same property, the puisne encumbrancer may have a fresh right to sue for possession as mortgagee, in case the mortgagor redeems the first mortgage and recovers possession from the first mortgagee. (Narain *v.* Simbhoo, I. L. R., 1 All., 235, P. C.) This case was decided under Act XIV of 1859.]

Art. 136.	136.—By a purchaser at a private sale for possession, of immoveable property sold when the vendor was out of possession at the date of the sale.	Twelve years ...	When the vendor is first entitled to possession.

[No. 136. (No. 136, Act IX). See notes to art. 137.

Private sales and certain auction sales.

A purchaser at a private sale (in such a case) cannot count limitation from the date of his purchase. A cause of action is not prolonged by a transfer of the title. (4 W. R., P. C., 37, 39). Limitation runs from the date of accrual of the vendor's right to sue. (Bhikree *v.* Ajoodhya, 3 W. R., 176). Auction-purchasers at a sale for arrears of revenue or rent are in this respect entitled to a special privilege. (See notes to art. 121, and I. L. R., 4 Calc., 103 ; 10 W. R., 15, 19). As to when a claim for possession is not independent of the right to sue for specific performance of the contract of sale, see the notes to art. 113.

Art. 136 when applicable.

Art. 136 applies to suits brought by private purchasers against *third* persons in possession of property in whose favor limitation runs in the same way as it would against the owner (*i.e.*, the vendor) with whose rights the purchaser is clothed. (Lakshman *v.* Bisu Sing, I. L. R., 15 Bom., 261, at p. 264 ; Lakshan *v.* Moru, I. L. R., 16 Bom., 722, at pp. 726, 727 ; Starling, 3rd Ed., p. 277). Art. 136 is intended to include cases in which the vendor is at the time of sale not entitled to possession of the property sold, and consequently the institution of a suit for possession has to be deferred till the right of any third person to its possession has determined. But the article does not apply to a suit by a person who purchased at a private sale from an execution purchaser, merely because the latter was not entitled to possession of the property purchased by him till the sale was *confirmed*. (Arumuga *v.* Chockalingam, I. L. R., 15 Mad., 331).

Private purchaser from execution purchaser.

Where the judgment-debtor was in possession at the date of an execution sale, a purchaser at a private sale from the execution purchaser, who has not received formal delivery of possession by the Court, cannot claim the benefit of this article. A suit by the private purchaser against the judgment-debtor is barred if the execution purchaser's suit is barred under art. 138. (Pullayya *v.* Ramayya, I. L. R., 18 Mad., 144).

Art. 142 or 144 when applicable.

Where the vendor was dispossessed by a third person before the date of sale, a suit by the vendee for possession against such third person is governed by art. 142. (Kashinath *v.* Shirdhar, I. L. R., 16 Bom., 343). The purchaser's suit for possession against the vendor himself after the latter has recovered possession is governed by art. 144. Limitation runs from the date of such recovery of possession. (Ram Prosad *v.* Lakhi, I. L. R., 12 Calc., 197 ; Syed *v.* Nana

I. L. R., 13 Bom., at p. 428). A suit for possession by the vendee against the vendor, when the vendor was in possession of the property at the time of sale, is not governed by this art. Article 144 will apply to such a case, and the possession of the vendor will be deemed to be adverse from the time when the ownership passed to the vendee. (See Anand *v.* Ali, I. L. R., 11 Calc., 229 ; and sec. 54, Act IV, 1882). Dr. Stokes suggests that such suits should be specially provided for.] Suit against vendor.

137.—Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve years ...	When the judgment-debtor is first entitled to possession.	Art. 137.
138.—By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale.	Ditto ...	The date of the sale.	Art. 138.

[Nos. 137 and 138. (Nos. 137 and 138, Act IX). See notes to art. 136.

If the vendor (under art. 136) or the judgment-debtor (under art. 137) purchased the land from A, at a private sale, but did not obtain possession at the date of the sale to the plaintiff, the latter's suit for possession against A will be barred (under art. 136 or art. 137) if twelve years have elapsed from the date when the land was purchased from A. The plaintiff's vendor or the judgment-debtor, though *out of possession*, was *first entitled* to possession at the date of his purchase from A. (See Anund *v.* Ali, I. L. R., 11 Calc., 29 ; Syad *v.* Nana, I. L. R., 13 Bom., 424). If after the sale by A he is dispossessed by a stranger before the plaintiff's vendor or the judgment-debtor could get possession, plaintiff's suit against such stranger will be governed by art. 144. But if the party in possession *derives* his title from the original owner A, art. 136 or art. 137 might apply. (See Lakshman *v.* Bisu Sing, I. L. R., 15 Bom., 261. See also Namdev *v.* Ramchandra, I. L. R., 18 Bom., 37). Where the defendant can avail himself of the possession of the party who was in possession before him, it is *immaterial* whether art. 136 or 137 on the one hand or art. 144 on the other, is considered applicable to the case. (See I. L. R., 18 Bom., 37, at p. 40). The vendor or the judgment-debtor. *Third* person holding adversely or derivatively.

An execution purchaser is, in general, treated as a private purchaser. See 12 Moore I. A., 366 ; 11 W. R., P. C., 29, and the notes under the terms "plaintiff" and "defendant," in sec. 3.

Art. 137 (like art. 136) applies to suits brought by purchasers against *third* persons in possession of the land in whose favor limitation runs against the purchaser, in the same way as it would against the owner with whose rights the purchaser is clothed. (Lakshman *v.* Bisansing, I. L. R., 15 Bom., 261, at p. 264. See also Starling, p. 277). Art. 138 will apply to a suit against the judgment-debtor remaining in possession ; but to a suit against a *third* person getting into possession subsequently to the date of sale, but before the purchaser got possession, art. 144 would more appropriately apply. A third person who does *not derive* his title to the property from the judgment-debtor Art. 138 or art. 144 ?

is protected by art. 144 whether the judgment-debtor was or was not in possession at the date of sale. (See Lakshman *v.* Bisansing, I. L. R., 15 Bom., 261).

The execution purchaser's suit against a third person, who has been in possession of the property under an alleged private purchase from the judgment-debtor, is necessarily barred, if such third person has been in possession for twelve years. (Shambhubhai *v.* Shivlal Das, I. L. R., 4 Bom., 89).

Summary remedy, and regular suit.

If the judgment-debtor is in possession at the date of sale, the execution purchaser may obtain possession in the executiou department under secs. 318 and 319 of the Civil Procedure Code. But although a speedy and *summary* remedy may be open to the plaintiff under sec. 318, Civil Procedure Code, his right to bring a *regular* suit for possession is not affected thereby. The two remedies are concurrent. (See Kishori *v.* Chunder, I. L. R., 14 Calc., 644; Sreemohun *v.* Bhogoban, I. L. R., 9 Calc., 602. See also Sevu *v.* Muttusami, I. L. R., 10 Mad., 53. For cases to a contrary effect, see Kristo *v.* Gunga, 25 W. R., 372; Lolit *v.* Ishan, 10 C. L. R., 258).

Suit under sec. 331, C. P. C.

It has been held that when an application under sec. 331 of the Civil Procedure Code is numbered and registered as a regular suit, the rights of the parties must be determined as if an ordinary suit for possession had been instituted against the defendant, and that such suit is governed either by art. 138 or art. 144 of the Limitation Act. (Namdev *v.* Ramchandra, I. L. R., 18 Bom., 37). It may be observed, however, that sec. 331 deals with decree-holders, and not with execution purchasers, and that art. 138 cannot apply to suits by persons *other* than *purchasers* in execution sales.

Effect of delivery of possession by Court.

Formal delivery of possession by the officer of the Court gives the purchaser a fresh start so far as the judgment-debtor and his representatives are concerned, but not against third parties. (See p. 118, *supra;* and Runjit *v.* Bunwari, I. L. R., 10 Calc., 993). The plaintiff is not bound to sue within twelve years from the date of sale if he obtained possession from the Court in the execution department. (Agharchand *v.* Rakhma, I. L. R., 12 Bom., 678. See also Lakshman *v.* Moru, I. L. R., 16 Bom., 722). In Krishna Lall *v.* Radhakrishna, I. L. R., 10 Calc., 402, a Division Bench of the Calcutta High Court, while holding that an execution purchaser might bring a regular suit for possession against the judgment-debtor, laid down that, if the formal possession obtained through the Court was not followed by any act of actual possession, the suit must be brought within twelve years from the date of sale under art. 138. But this was hardly consistent with the Full Bench Decision in Juggobundhoo *v.* Ram Chunder, I. L. R., 5 Calc., 584, as explained by the same Bench in Doyanidhi *v.* Kelai, 11 C. L. R., 395, 398. This question has been fully discussed in Shamachurn *v.* Madhub, I. L. R., 11 Calc., 93. And a Full Bench of the Calcutta High Court on the 21st of March 1889 overruled the decision in Krishnalall's case. (See Jogobundu *v.* Purnanund, I. L. R., 16 Calc., 530). G purchased the rights and interests of J, in certain lands in an execution sale on the 8th January 1873, and obtained formal or symbolical possession through the Court on the 10th August 1873. Plaintiff purchased G's rights in another execution sale, and obtained symbolical possession on the 3rd March 1875. The original owner's representatives continued to be in actual possession notwithstanding the two deliveries of possession by the Court. Plaintiff's suit for possession against these representatives, *viz.*, J's son and his lessee, instituted on the 7th of August 1885, was held to be in time. The second delivery of possession by the Court, that is, the

symbolical possession obtained by the plaintiff in 1875 could not affect the defendants as they were not parties to the execution against J. But the possession delivered by the Court in August 1873 to G in whose shoes the plaintiff stood entitled the plaintiff to compute the period of limitation from the date of such delivery. (Jogobundhu Mitter *v.* Purnanund Gossami, I. L. R., 16 Calc., 530, F. B.) G was (legally) in possession on the 10th of August 1875, and entitled to be in possession again on that date, within the meaning of art. 137. And the subsequent possession of the original owners of the property was *adverse* to plaintiff's predecessors under art. 144, or amounted to a dispossession under art. 142. For other cases under art. 138, see Koonjomohun *v.* Nobocoomer, I. L. R., 4 Calc., 216, and Umashankar *v.* Kalka, I. L. R., 6 All., 75, cited under art. 91. As to the effect of delivery of possession under secs. 263, 264, 318 and 319 of the Civil Procedure Code of 1882, see p. 118, *supra*. As to whether there is any difference in the operation of secs. 263 and 318 on the one hand, and of secs. 264 and 319 on the other, see Lokessur *v.* Purgun, I. L. R., 7 Calc., 418, and Venkataramana *v.* Viramma, I. L. R., 10 Mad., 17, at p. 20 on the one hand; and Shoteenath *v.* Obhoy, I. L. R., 5 Calc., 331, and Lakshman *v.* Moru, I. L. R., 16 Bom., 722, at p. 728, on the other.

Effect of symbolical delivery when judgment-debtor was in *khas* possession and when not.

The plaintiff, in a case under art. 138, has no right to sue until the sale is confirmed, but time runs against him from the date of sale. (See Kishori *v.* Chunder, I. L. R., 14 Calc., 644 ; and pp. 231, 260, 261, *supra*). Where it is not proved that the judgment-debtor was out of possession at the date of sale, art. 138 applies, and the execution purchaser's suit, though brought within twelve years from the date of confirmation of sale, and from the date upon which the certificate of sale was issued, is barred if twelve years have elapsed from the date of sale. (Venkatalingam *v.* Verasami, I. L. R., 17 Mad., 89). The sale in this case took place *before* sec. 316 of the Civil Procedure Code was amended by Act XII of 1879, but as art. 138 had not been amended by the Legislature, the purchaser's suit was held to be barred although his right to sue did not accrue before the sale was confirmed. —*Ibid.* When the execution purchaser obtains possession, but is afterwards dispossessed, art. 142 will apply.

Date of *sale*, not of *confirmation*.

Art. 138 is applicable to a suit brought by the son or the assignee of the auction purchaser at an execution sale. (Arumuga *v.* Chokalingam, I. L. R., 15 Mad., 331).

Assignees and heirs.

Arts. 136, 137, 138 do not apply to purchasers at a revenue sale under Act XI of 1859. On confirmation of such a sale the title of the purchaser is deemed to have vested on the *day after* that fixed as the last day for payment of the revenue of the estate. Such a purchaser's suit for possession is governed by art. 144.]

Purchasers under Act XI of 1859.

139.—By a landlord to recover possession from a tenant.	Twelve years ...	When the tenancy is determined.	Art. 139.

[No. 139. (No. 140, Act IX).

This article applies only when the land is in the possession of a person who was a tenant of the plaintiff. Where there is no agreement to pay *rent* by the holder who is permitted to occupy the land on condition that he should do blacksmith's work for the landlord, such holder or occupier is a *licensee* and not a tenant. (Attakuthe *v.* Govinda, I. L. R., 16 Mad., 97). Such permissive holders may be evicted when they cease to do such service, and

Who are *not* tenants.

without a previous notice to quit. (*Ibid.*, see also Harogobind *v.* Ramratno, I. L. R., 4 Calc., 67). As to when a person who alleges a tenancy under the plaintiff can plead limitation, see Dinomonee *v.* Doorgapersad, 21 W. R., 70, F. B. ; and Maidin *v.* Nagapa, I. L. R., 7 Bom., 96. As to how and when the possession of the land becomes adverse to the landlord, see *supra*, pp. 133 *et seq.*

Plea of limitation by tenant.

Tenancy by sufferance.

When a tenant for a term of years holds over, he becomes, it has been held, a tenant by sufferance. The possession of a tenant by sufferance is not adverse to the landlord, and in British India limitation does not run against the landlord until the tenancy is determined. A tenancy by sufferance may be determined by the act of the landlord, who by assent may convert it into a tenancy at will, or by dissent make the continuance in possession tortious, or it may be determined without the landlord's intervention by the transference of possession to a third party ; for having no title, the tenant on sufferance can convey none. For the same reason, if a tenant by sufferance dies, and his representative enters and holds on, he holds as a trespasser. Under the present English law the landlord must sue within twelve years from the expiry of the term, *i.e.*, from the time when his right of entry accrues. But under art. 139, in the case of a tenancy for a term of years, time does not, it has been held, *necessarily* run from the expiry of the term. It is for the defendant to show that there was no tenancy by sufferance, or that it has been determined, and that twelve years have elapsed from the date of such determination. (Adimulam *v.* Pir, I. L. R., 8 Mad., 424). Under the Transfer of Property Act, secs. 111 and 116, a lease determines by efflux of the time limited thereby, and holding over renews the lease (from year to year or from month to month) if the landlord assents to the tenant's continuing in possession. In the *absence* of *consent* on the part of the landlord, such holding over *may* be treated as a trespass. (Gab *v.* Moharanee, 15 W. R., 133 ; Choudhuri *v.* Bhoosee, 25 W. R., 201).

Not adverse.

The *ordinary* case of a tenant holding over after the expiry of his tenancy is not a case of adverse possession. (See Krishnaji *v.* Antaji, I. L. R., 18 Bom., 256, at p. 258 ; Tatia *v.* Sadashiv, I. L. R., 7 Bom., 40). Where a third person (a son or a son-in-law) lived with the tenant for life in the demised premises until the death of the tenant for life and continues to do so after his death without coming to any arrangement with the reversioner, the possession of such third person does not become adverse to the reversioner until the former expressly sets up a title of ownership in the property. The reversioner may sue such permissive holder for "use and occupation," or eject him from the premises although more than twelve years have elapsed from the death of the tenant for life. (See Krishnaji *v.* Antaji, I. L. R., 18 Bom., 256, at p. 259).

Suits about rent.

Suits for arrears of rent (in the absence of a local or special law) are governed by art. 110 or art. 116 (see p. 750, *supra*). Mere non-payment of rent does not constitute adverse holding. (See pp. 140 and 326, *supra*). A suit for assessment of rent is governed by art. 130.

Effect of a resumption decree.

Where a suit for resumption relates to land alienated from the *mál* estate after the 1st December 1790, a declaratory decree obtained in such a suit establishes the relationship of landlord and tenant between the person in whose favor the decree is passed, and the person against whom it is passed. But if the resumption decree relates to lakhiraj land held under an invalid title created before the 1st December 1790, a suit for assessment of rent on such land must under art. 130 be brought within twelve years of the resumption decree. As regards lakhiraj holdings not admitted or shewn to have been in exist.

ence before 1790, a declaratory decree for resumption does not establish the relationship of landlord and tenant between the parties. The possession of the alleged lakhirajdar, even after the date of the resumption decree in such a case, is the possession of a trespasser, and not that of a tenant of the decreeholder. (See Bir Chunder *v.* Rajmohun, I. L. R., 16 Calc., 449 ; Protab *v.* Sukhu, 2 C. L. R., 569, 571 ; Saudamini *v.* Surrup, 17 W. R., 363 ; Modhoo *v.* Nepal, 15 W. R., 440 and p. 788, *supra*).

When landlord may sue trespasser for *khas* possession of the land.

As against the landlord, possession is not adverse until the tenancy is properly determined. (See pp. 140-142, *supra*). There may be adverse possession where the defendant pretended a tenancy which the plaintiff throughout denied. (Maidin *v.* Nagapa, I. L. R., 7 Bom., 96 ; p. 85, *supra*). The landlord may (under art. 144) sue a person who has dispossessed his lessee within twelve years of the expiry of the lease. (See pp. 143-145, *supra*, and Krishna *v.* Hari, I. L. R., 9 Calc., 367 ; Sheosohye *v.* Luchmeshur, I. L. R., 10 Calc., 577 ; Sharat *v.* Bhobo, I. L. R., 13 Calc., 101). See also Chinto *v.* Janki, I. L. R., 18 Bom., 51, at p. 55. In Gosain Mohendro Gir *v.* Rojonikant, second appeal No. 1850 of 1892, Trevelyan and Banerjee, JJ., held on the 1st of May 1894 that the rulings in I. L. R., 9 Calc., 367, 10 Calc., 577, and 13 Calc., 101, apply to the case of lands held by an *ijaradar* or middleman, and not to lands in the occupation of ordinary *raiyats* or cultivators paying their rent *directly* to the landlord. It has been held in Bombay that a trespasser on a field held by a *mirasdar* whose tenure has not come to an end, cannot be ejected at the instance of the *mirasdar's* landlord, and that such landlord cannot be prejudiced by the possession of such a trespasser. (Vinayak *v.* Mainai, I. L. R., 19 Bom., 138). For the English law on the subject, see the judgment of Telang, J., in Chinto *v.* Janki, I. L. R., 18 Bom., 51, at p. 58 ; and pp. 141, 143, *supra*.

Declaratory suit.

Although the landlord cannot sue for khas possession so long as the tenancy continues, it is open to him to bring a suit against the trespasser for the purpose of having his rights declared as against such trespasser. (Bissesuri *v.* Baroda, I. L. R., 10 Calc., 1076). It has been also laid down in this last case that the landlord may, in a suit against the tenant and the trespasser, ask for the further relief that he should be placed in the same position " as before " as regards the tenant. For a similar suit by a reversioner during the life of a Hindu widow, see Nobin *v.* Issur, 9 W. R., 505, F. B., cited at p. 780, *supra*.

Article does not apply to permanent tenancies.

Art. 139 refers to suits in respect of tenancies in which the leases have expired and so have terminated (see Chaturi *v.* Makund, I. L. R., 7 Calc., 710, at p. 712) or in respect of tenancies terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover possession by establishing that a mokruree lease (granted by a preceding ghatwal) is invalid and not binding (as against a succeeding ghatwal). See Modho *v.* Tekait, I. L. R., 9 Calc., 411. Art. 144 applies to such a case. (See Ram *v.* Modho, I. L. R., 12 Calc., 481, at p. 493, P. C.; notes to arts. 124 and 140, and p. 134, note (2), *supra*).

As to the plea of limitation by a person claiming a *perpetual* lease, see p. 134, *supra*. The possession of a tenant at a quit-rent not subject to ejectment so long as he pays it does not become adverse to the landlord until he makes an active assertion of his claim to be a perpetual tenant, up to which time he would in the eye of the law be regarded as a tenant at will. (Vithalbowa *v.* Narayan, I. L. R., 18 Bom., 507, at p. 512).

A landlord is generally a reversioner. But in the case of a permanent saleable undertenure, though rent is payable to the superior holder, he has no reversionary right in the land. (See Beejoy *v.* Kally Prosono, I. L. R., 4 Calc., 327). Where a lease of land purports to be a *perpetual* lease without reversion to the grantors, even if the grantors are in wrongful possession at the date of the grant, and such wrongful possession is determined by symbolical possession taken by the plaintiff in execution of a decree against such grantors, the possession of the perpetual lessee is adverse to the plaintiff from the date of the lease. (Gosain *v.* Bepin, I. L. R., 18 Calc., 520. See p. 134, *supra*). It has been held that under the Bengal Tenancy Act, even non-occupancy *ryots* who were settled on the land by a trespasser whose wrongful possession of the estate is determined (by possession obtained by the plaintiff through the Court in execution of a decree against the trespasser) must be treated as tenants, and cannot be evicted as trespassers. (Binad *v.* Kalu, I. L. R., 20 Calc., 708, F. B.)

Ryots and permanent tenants under a trespasser.

The publication of a notice to quit in a local newspaper, even under circumstances which make it highly probable that the notice in question has come to the knowledge of the tenant, is not, without more such proof of service as will suffice to terminate the tenancy, or entitle the tenant to contend that he remained, after the date fixed by the notice to quit, in adverse possession of the premises. (Chandmal *v.* Bochraj, I. L. R., 7 Bom., 474). A notice to quit rent by a registered letter which the addressee refused to receive was held to have been sufficiently served for the purpose of terminating the tenancy. (Jogendro *v.* Dwarkanath, I. L. R., 15 Calc., 681). The landlord and tenant may by *agreement* determine the relation of landlord and tenant existing between them. An unsuccessful attempt of the landlord to obtain a surrender of the demised premises, or an attornment of the tenant to a third party without the knowledge of the landlord, is not sufficient to determine the tenancy. (*In re* Sarbananda *v.* Pransanker, I. L. R., 15 Calc., 527). See p. 141, *supra*. A renewal of a lease before the expiration of the term operates as a formal surrender and determination of the original lease. (See p. 146, *supra*). If a lessee for a term takes a *perpetual* lease from the landlord that also may operate as a surrender of the term. But if the second lease is repudiated by the landlord as void and inoperative, he cannot in the same breath claim that it operated to effect a surrender of the prior lease. (Ramuni *v.* Kerala, I. L. R., 15 Mad., 166). As to the effect of a surrender during the continuance of the lease, see (note 8), p. 143, and p. 146, *supra*. The *surrender* of a lease before the expiration of the term does not determine the interest of a sub-lessee of the original lessee. (See Haramonee *v.* Gunganarain, 10 W. R., 384; Ecclesiastical Commissioners *v.* Treemar, 1893, 1 Ch., 166, 167). But the *forfeiture* of a lease annuls all sub-lessees (sec. 115, Act IV of 1882). A void lease does not require to be determined by notice. If the lease under which a person enters the land is absolutely void and he pays no rent to the owner, the legal relationship of landlord and tenant is not created, and the owner may re-enter the land even from the date of the void lease. (President of Magdalen Hospital *v.* Knoth, 4 App. Cas., 324).

Determination of tenancy, by notice to quit, by surrender or forfeiture.

Surrender does not affect sub-lease.

A permissive occupation, which has very considerable resemblance to an English tenancy-at-will, is of frequent occurrence in this country. But we are not hampered here by the provision which has raised so many nice points in England under sec. 5 of the Statute of William IV with regard to tenancies-at-will ceasing at the end of the first year's occupancy. (Gobindlal *v.* Debendronath, I. L. R., 6 Calc., 311, 314, 316). A tenancy-at-will created by A in favor of B is not necessarily determined on the death of either A or B. (I. L. R., 6 Calc.,

Permissive occupations.

311, 315 ; 4 Bom., A. C., 155). The possession of B's heirs may continue to be permissive. (*Ibid.*) Every permissive occupation is not a tenancy within the meaning of art. 139. (Gobindlal *v.* Debendronath, I. L. R., 5 Calc., 679, 683). Where one party is permissively in the occupation of land which belongs to another, although the period during which he had permission to occupy may have expired, no cause of action arises until one of two things has happened ; either that there has been a demand of possession on the part of the owner, or that the owner's title has been denied by the permissive occupant. (Khurruckdharee *v.* Rewat Lall, 12 W. R., 167, 168). So long as such occupation does not become adverse to the owner, limitation does not begin to run against him either under art. 142 or art. 144. (I. L. R., 6 Calc., 311). Where once the relation of landlord and tenant is established, it is for the defendant to establish its determination by affirmative proof over and above the mere failure to pay rent. (See Prem Sukh *v.* Rhupia, I. L. R., 2 All., 517 ; and pp. 140, 141, *supra*). As to grantees of tenants, and as to adverse possession against tenants, see pp. 142 *et seq.*, *supra*.

Onus of proving determination.

When the landlord is entitled to possession by reason of any forfeiture or breach of condition, before the expiry of the term of the lease, he must (under the Transfer of Property Act) do some act showing his intention to determine the lease ; otherwise, the tenancy continues. (See sec. 111, Act IV of 1882). This provision may not apply to agricultural leases.

Forfeiture and repudiation.

As to the effect of an absolute repudiation of the landlord's title, see pp. 140, 141, *supra* ; Mozhuruddin *v.* Gobind, I. L. R., 6 Calc., 436 ; Krishnaji *v.* Antaji, I. L. R., 18 Bom., 256, at p. 259 ; Haidri *v.* Nathu, I. L. R., 17 All., 15. (Cf. Kalikrishna *v.* Golam Ali, I. L. R., 13 Calc., 248, P. C.; Drobomoyee *v.* Davis, I. L. R., 14 Calc., 323, at p. 342, in which an ordinary tenant falsely set up a permanent tenure).

The tenant forfeits the right to notice by denying the landlord's title *prior* to suit. A denial of title for the first time, made in the suit for ejectment, does not preclude the necessity of proving a valid notice to quit. (Unhamma *v.* Vaikunta, I. L. R., 17 Mad., 318 ; Madavan *v.* Athi, I. L. R., 15 Mad., 123).

Under the Bengal Tenancy Act there cannot be any eviction on the ground of forfeiture incurred by denying the title of the landlord. (Debiruddi *v.* Abdur Rahim, I. L. R., 17 Calc., 196 ; Dhara *v.* Ram, I. L. R., 20 Calc., 101).

Under the general law in cases of forfeiture, the tenant may be treated as a trespasser and evicted *without notice*, (I. L. R., 20 Calc., 101).

Ejectment of tenants under Beng. Ten. Act, 1885.

The Bengal Tenancy Act, VIII of 1885, Sched. III, prescribes a period of one year for a suit to eject a tenant on account of any breach of a condition, in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach. Sec. 45 of the same Act provides that a suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy raiyat unless notice to quit has been served on the raiyat not less than six months before the expiration of the term, and shall not be instituted after six months from the expiration of the term. A suit against an ijaradar in the position of a middleman is not governed by this provision. Sec. 46 of the same Act provides that a suit for ejectment on the ground of refusal to agree to an enhancement of rent shall not be instituted against a non-occupancy raiyat unless the landlord has tendered to the raiyat an

agreement to pay the enhanced rent, and the raiyat has, within three months before the institution of the suit, refused to execute the agreement.]

Art. 140.	140.—By a remainderman, a reversioner (other than a landlord), or a devisee for possession of immoveable property.	Twelve years ...	When his estate falls into possession.

[No. 140. (No. 141, Act IX).

Remainders and reversions.

In the same land there may at the same time be an estate in possession, and one estate or several estates in remainder, and an estate in reversion. When the estate in possession is determined, the estate in remainder if there be any, otherwise the estate in reversion, will become an estate in possession. (Wharton.) Remainder.—That expectant portion, or ulterior estate, which, on the creation of a particular estate, is at the same time conveyed away, by the owner, to another who is to enjoy it immediately after the determination of such particular estate. A remainder does not, like a reversion, arise by operation of law, but is always created by act of parties. (Wharton and Stephen). On the determination of a particular estate for life or years, there may be several consecutive remainders for life or years, or one remainder in fee. An estate in reversion is where any estate is derived by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived. On the determination of the estate so derived by grant or otherwise, that is, on the determination of the particular estate, the possession returns or reverts to the original owner, who is for the reason called the reversioner. Art. 140 deals with a class of persons who claim under a title quite independent of the particular limited estate upon which the remainder, reversion or other estate is dependent (Azam *v.* Faizuddin, I. L. R., 12 Calc., 594, at p. 596).

English law. How it differs from the Indian law.

The English Real Property Limitation Act, 1874, shortens the time allowed to estates in reversion or remainder or other future estates, in cases where the owner of the particular estate has been dispossessed by a person claiming an adverse title, and time has begun to run against him, giving twelve years from that time, or six years only from the time when the estate vests in, or falls into, possession—whichever period shall be the longer. (William's Real Property Law, 15th Ed., p. 555). But where an alienee of the life-tenant or other owner of a particular estate has been in possession, full twelve years are allowed from the time when the estate falls into possession. (Pedder *v.* Hunt, 18 Q. B. D., 565). For the distinction between the possession of an alienee of a tenant for life, and adverse possession against such a tenant, see pp. 155 (note 6), and 780, *supra*. Art. 140, like art. 141, of the Indian Act gives the reversioner, &c., full twelve years in *either* case.

Hindu widows and so-called reversioners.

A childless Hindu widow's estate (though a limited estate) is not a particular estate for life. She is more like a tenant-in-tail, and the so-called reversionary heirs are more like the issue-in-tail. As regards an adverse holder of the property, the issue-in-tail are barred by limitation, if the tenant-in-tail is barred, but the remainderman is not so barred. (Nobin Chunder *v.* Issur Chunder, 9 W. R., 505, 507, F. B.) See also the Shivagunga case, 9 Moo. I. A., 539, where their Lordships of the Privy Council held that a Hindu widow (like an English tenant-in-tail) represents the inheritance, and that reversionary heirs are bound by a decree fairly and properly obtained against the widow. As regards the subsequent remainderman, the

law has been altered in England by the 3rd and 4th William IV, Chap. 27, and the Statute of 1874. Any person whose remainder the tenant-in-tail could bar by his own act, would now be barred. (Banning, pp. 112 and 113).

The old law and the new as regards Hindu widows.

Art. 141 of Act XV (like art. 142 of Act IX) expressly gives the so-called reversionary heirs of Hindu law privileges similar to those which the remainderman or the reversioner is entitled to under art. 140. (See pp. 155, 156, *supra*, and Sreenath *v.* Prosunno, I. L. R., 9 Calc., 934, F. B.) If before the coming into operation of Act IX of 1871, that is, before 1st April 1873, adverse possession for twelve years against a Hindu widow extinguished the right to the property, the reversionary heir cannot claim the privileges accorded to him by these later Acts. (Drobomoyee *v.* Davis, I. L. R., 14 Calc., 323, at p. 344). As regards possession under *alienations* made by a Hindu widow, the old law did not differ from the new, and alienees in possession since 1850 or even earlier cannot resist the reversioner's suit under this article. (See Samvasiva *v.* Ragava, I. L. R., 13 Mad., 512, 516). The law as to Hindu *widows* applies to other female heirs, such as mothers and daughters. (Nobin *v.* Issur, 9 W. R., 505, at p. 509, F. B.; Harinath *v.* Mothurmohun, I. L. R., 21 Calc., 8, at p. 18, P. C.)

Grantees for life.

The possession of a purchaser (in execution) of the rights and interests of a grantee for life is not adverse to the grantor or his representatives during the grantee's life. A suit by the grantor's representatives in interest, for possession against such an alienee, is in time if brought within twelve years of the death of the grantee (Kalidas Mullick *v.* Kanhayelall, I. L. R., 11 Calc., 121, at p. 431, P. C.) Art. 140 might apply to such a case, but their Lordships of the Privy Council decided it with reference to art. 144, the result being the same under either article. See also I. L. R., 14 Mad., 495.

Impartible estate vested in a joint family.

It may be that when an impartible estate vests in a joint family consisting of several coparceners, and is capable of enjoyment by only a single member at a time, the rights of survivorship vesting in the other coparceners cannot arise as between themselves, until each branch entitled to preferential enjoyment according to seniority of descent, either becomes extinct or relinquishes its rights. But as between the joint family, and adverse holders, the senior coparcener in enjoyment for the time being represents for purposes of limitation, the entire joint family consisting of his lineal descendants and collateral coparceners. The representation of the junior members in the person of the senior member is more complete than the representation of a reversioner by a childless Hindu widow. Adverse possession, which bars the senior member, will, therefore, bar the junior members, although their right to the enjoyment of the property does not accrue until the senior member dies or relinquishes his rights. (Vijayasami *v.* Periasami, I. L. R., 7 Mad., 242). Such a case as this is governed by art. 144, and not by art. 140 or art. 141.

Endowments for religious purposes.

In the case of an endowment, where the founder granted lands to A and his descendants for the purpose of maintaining the worship of an idol, the management of the endowment being vested in the family of A, each member of such family succeeds to the management per *formam doni* (by the form of the gift), and it has been held that, in a suit to recover a share of the management by A's grandson against another member of the family (who had purchased the same in execution of a decree against plaintiff's father), the plaintiff is not barred by limitation, simply because his deceased father would have been so barred. (Trimbak *v.* Narayan, I. L. R., 7 Bom., 188). But

Sebaits, &c.

a succeeding *sebait* is bound by a decree obtained (Prosunno Koomari *v.* Golab Chand, 23 W. R., 253, P. C.), or by adverse possession held by a third person against his predecessor in respect of the idol's property. As to *Wuqf* property and *mutwullees*, see Amrutlall *v.* Sheikh Hossein, I. L. R., 11 Bom., 492; Sheikh Loel *v.* Lalla Brojokishore, 17 W. R., 430. As to endowed property and alienations by Mohunts, see Mohunt Burm *v.* Khashee, 20 W. R., 471. As to *karnams*, see Venkayya *v.* Suramma, I. L. R., 12 Mad., 235, 237. And on this subject generally, see p. 157, *supra*, the notes to art. 124, and Radhabai *v.* Ram Chandra, I. L. R., 9 Bom., 198.

Effect of first successor of alienor not suing alienee.

It has been held by the Bombay High Court that, in respect of *vatans* appendent to hereditary offices, if A, the present incumbent, alienates the land, and after A's death, A's successor in office suffers twelve years from that event to elapse without bringing his suit to recover the land, not only he, but his successors also, would be barred by limitation. (Babaji *v.* Nava, I. L. R., 1 Bom., 535. See also I. L. R., 9 Bom., 198).

Case of mokurari leases for maintenance.

Where a grant by a Rajah of a mokurari lease in lieu of maintenance is, by the custom of the *raj*, liable to revocation at the instance and at the discretion of succeeding Rajahs, each Rajah who, having notice of a claim to hold such mokurari, allows twelve years to go by without taking steps to get rid of it, is, it has been held, at least so far as he is concerned, barred by limitation. (Petamber *v.* Nilmoney, I. L. R., 3 Calc., 793). So, when a mokurari tenure is granted by a ghatwal, and the successor of such ghatwal, being one of the ghatwals to whom Beng. Reg. XXIX of 1814 applies, wishes to resume that tenure, he must (it was held by the Calcutta High Court) bring his suit within twelve years after succeeding to the ghatwali estate. (Madho *v.* Tekait, I. L. R., 9 Calc., 411). But this decision has been overruled by their Lordships of the Privy Council on the ground that (under art. 144) the possession of a tenure-holder does not become adverse until he sets up the permanancy of the tenure, and the superior holder denies it. (See Ramchunder *v.* Madho, I. L. R., 12 Calc., 484, P. C., and p. 134, *supra*.

Falling into possession, and forfeiture.

Estates in remainder or reversion are estates in expectancy as opposed to estates in possession. The estate of the remainderman or the reversioner falls into possession on the determination of the particular estate which precedes it. According to the English law, a reversioner, on a particular estate for years or lives, has the ordinary period within which he may pursue his remedy after his reversion falls *naturally* into possession, independently of any right which he may previously have acquired (but has not exercised) to the same by reason of any forfeiture. No one is obliged to take advantage of a forfeiture. This is old law, and is expressly preserved by sec. 4, of 3 and 4 Will. IV, c. 27. (Banning, pp. 100, 102, 147). But there is no provision in the Indian Limitation Acts corresponding to sec. 4 of 3 and 4 Will. IV, c. 27. (See art. 143). In England, a landlord is ordinarily a reversioner. (See notes to art. 139). As to the meaning of the words "other than a landlord" in art. 140, see Krishna Govind *v.* Huri, I. L. R., 9 Calc., 367, and note (6), p. 145, *supra*).

Devisee's suit for possession.

The English law (sec. 3 of the Statute of 1834 and sec. 2 of the Statute of 1874) speaks of "an estate or interest in reversion or remainder or other future estate or interest." These words are comprehensive enough and will include all executory devises. (Banning, p. 99). Art. 140 of the Indian Act deals with "a remainderman, a reversioner or a devisee." A devisee's suit for possession of immoveable property (in the case of persons governed by the Hindu law)

must be brought within twelve years from the death of the testator—not from the end of one year after the death of the testator. (Mylapore *v.* Yeo, I. L. R., 14 Calc., 801, at p. 807, P. C.) It *may possibly* be *otherwise* in the case of persons to whom the provisions of the Indian Succession Act apply. (See p. 776, *supra*; sec. 297, Act X of 1865 and sec. 117, Act V of 1881, and the notes to art. 123). The terms of the bequest often postpone the vesting in possession of the legacy. (See sec. 106, Act X of 1865). As to contingent and conditional bequests, see secs. 107, 116, Act X of 1865. A provision in a will that the properties devised should remain under the *management* of the testator's widow, and after her, of some other person so long as the devisee did not attain the age of thirty years, does *not* prevent the devised estate from "falling into *possession*" on the death of the testator (See Krishna *v.* Panchuram, I. L. R., 17 Calc., 272, at p. 276).

Falling into, or vesting in, possession.

Is a suit for a bequest of immoveable property *against* an *executor* (who is under a legal obligation to deliver the legacies of the testator to the legatees) governed by this article? It may be contended that if the suit is for a legacy *as such*, and against the executor *as such*, art. 123 will apply. But though the term "legacy" in the Indian Succession Act, includes a devise of *immoveable* property, the Legislature may not have used the term in that extended sense in art. 123, Act XV of 1877. The omission, however, of the word "moveable" which appeared in the corresponding provisions of Act IX of 1871 (see art. 122 of Act IX) makes art. 123 of Act XV applicable to suits for *distributive* shares of the *immoveable* property of a person dying intestate. See pp. 775, 776, *supra*.

Is a devise of immoveable property a "legacy" within art. 123.

Art. 140 does not apply to a suit by a landlord as such suing his tenant. See p. 145 (note 6), *supra*, and I. L. R., 8 Mad., 424, 427.

Landlord *as such*.

When limitation has once *begun* to run against the *owner in fee*, he cannot, by putting the estate into settlement, give new claims to persons taking remainders, &c., under such settlement. Art. 140 does not apply to such cases. (See Banning, 111; and p. 152, *supra*).]

If time begins to run against *full* owner.

141.—Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	Twelve years ...	When the female dies.	Art. 141.

[No. 141. (No. 142, Act IX). See notes to arts. 125 and 140.

"Like suit."—That is, suit for "possession of immoveable property." (See Harinath *v.* Mothur Mohun, I. L. R., 21 Calc., 8, at p. 17 P. C.) It has been held in Calcutta and Allahabad that a suit under art. 141 is not only a suit for possession of immoveable property but that it is a suit of the same nature as a suit by a reversioner under art. 140. Thus, it has been held that art. 141 refers to suits by persons, who on the death of a Hindu or Muhammadan female, claim under an *independent* title, in the same way as remaindermen and reversioners claim in suits under art. 140. It does not apply to the case of a person suing on the very *same* cause of action which accrued to the female, and suing by right of being *her heir* (Azam *v.* Faizuddin, I. L. R., 12 Calc., 594). The article does not apply to a suit for possession by an *heir-at-law*. It applies to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied a position similar to that of a remain-

"Like suit."

Where art. 141 does or does not apply.

Art. 141 does not apply to heirs at law.

derman, a reversioner or a devisee. (Hashmat *v.* Mazhar, I. L. R., 10 All., 343). The article does not apply to a case where a female is entitled *absolutely*, and what is claimed on her death is not a *reversion* but an *inheritance*. (See Starling, 3rd Ed., p. 291). A suit by a Hindu son or daughter for the possession of immoveable property belonging to his or her mother, as her *stridhana*, is not governed by this article. A son adopted by a Hindu widow as heir to her husband is bound by the adverse possession suffered by her before the adoption. (Krishnaji *v.* Morbhat, I. L. R., 13 Bom., 276. See notes to art. 125). The adopted son is *not* a *reversionary* heir. He takes the property in *supersession* of the widow—not on her *death*. As the *immediate* heir of the last *male* owner he cannot claim the benefit of the provisions of art. 141. But if the heir-at-law is *artificially* (as by a settlement award) placed in the position of a *reversioner*, so that he is entitled to the possession of the estate on the death of his father's widow (on whom proprietary rights had been conferred by such award) he is entitled to the benefit of the provisions of this article. (See Nilkanrao *v.* Tukaram, 8 Cent. Prov. Law Reports, p. 102).

Exception.

Art. 144 applies to them if art. 123 does not.

Suits by immediate heirs-at-law for recovery of immoveable property belonging to their ancestor but in the possession of others *since* his death are ordinarily governed by art. 144. If the property be in the possession of an *administrator* of the estate of the deceased, art. 123 *may* apply. Armenians, Eurasians, Christians and others to whom the provisions of sec. 190 of the Indian Succession Act apply cannot establish their right to the property of a person who has died intestate unless letters of administration have first been granted by a Court of competent jurisdiction. A suit by such persons for their distributive shares against the *administrator* must necessarily be governed by art. 123. If the immoveable property of the deceased ancestor is (since his death) in the possession of a person who claims to hold it adversely to the heir, the latter's suit for possession will be governed by art. 144.

"Entitled."

"Entitled to the possession of immoveable property."—That is, entitled under the *existing law* to bring a suit for possession on the death of the female. A decree against a Hindu female dismissing her suit for possession of the immoveable property of the last male owner is binding on the reversionary heir, although such suit was dismissed on the ground that it was barred by limitation. And the reversionary heir so bound by the decree is *not entitled* on the death of the female to bring a suit for possession of such property. Art. 141 cannot be construed as altering the existing law respecting the *effect of a decree*. (Harinath *v.* Mothur Mohun, I. L. R., 21 Calc., 8 P. C.) On the other hand, if the widow does not sue the person in adverse possession of her husband's estate, and if no decree is passed against her, the reversionary heir may, under art. 141, sue to recover possession within twelve years of the widow's death. (Norris and Macpherson, JJ., point out this anomaly in their judgment at pp. 12 and 13 of I. L. R., 21 Calc.)

Decree against widow *disentitles* reversioner.

Where time begins to run against *full* owner.

When limitation has once commenced to run against the last male owner, the reversionary heir who would succeed on the death of the widow is not entitled to a fresh start, on *general* principles of the existing law. (See p. 152, *supra*; notes to art. 140; Starling, 3rd Ed., p. 202). It is apprehended that art. 141 will give the reversioner a fresh start on the death of a female *entitled* to a widow's estate, provided no cause of action accrued to the last full owner, and provided the possession of the defendant commenced *after* the death of the full-owner. A Hindu widow is *not entitled* to a woman's estate where there

is a qualified son surviving the husband, or where the property left by him is an impartible zemindary. If the widow in either of these cases wrongfully takes and maintains possession against the *rightful heir*, no fresh right accrues to such heir or his representative on the death of such widow. The son or other male relative being entitled to possession on the death of the widow's *husband* (and not on *her death*) cannot claim the benefit of the provision of art. 141. The old law applicable to such cases was not different. Although the old rule that "adverse possession against the widow which barred the widow barred the *reversioner* also," did not and could not apply to cases of adverse possession *by* the widow against the rightful and *immediate heir* of the husband, time commenced to run against such heir from the time when the widow wrongfully took possession, and there was nothing to stop the running of time or to revive the right of action. Such adverse possession by the widow if maintained for twelve years, would (under the old as well as the new law) be a bar to the title of all persons who could claim as succeeding to the property on the death of the widow's husband. This is well exemplified in Koolappa *v.* Koolappa, I. L. R., 17 Mad., 34, and Lachhan *v.* Manorath, I. L. R., 22 Calc., 445, P. C. In the first case which related to an impartible zemindary, it was held that wrongful possession by the widow and her daughter from 1822 when the plaintiff's great grandfather became entitled to the possession on the death of the widow's husband was a bar to the plaintiff's suit although it was instituted within twelve years of the death of the widow's daughter. In the second case which related to ordinary immoveable property, wrongful possession taken by the widow to the exclusion of her son from 1859 or at least to the exclusion of her son's widow from 1861 was held by their Lordships of the Privy Council to have extinguished the title of all persons who could claim as succeeding to the property on the death of her husband in 1859. In this case it was not necessary for their Lordships to consider whether the reversionary heirs of the son were or were not entitled to a fresh right to sue under art. 141 of Act XV of 1877 or art. 142 of Act IX of 1871. The son's widow was still alive and a previous suit by her against her mother-in-law had been dismissed on the ground of limitation. Besides, the adverse possession of the mother-in-law from 1861 had before the new law came into operation in 1873, extinguished the right of the daughter-in-law and of the reversionary heirs of the latter's husband. The plaintiffs claimed to be the reversionary heirs both of the elder widow's husband and of his son. But as the son was the last full owner they could not strictly speaking claim the property as the reversionary heirs of his father. Their case was that the elder lady got possession of the property *as a Hindu* widow and that her possession till the time of her death in 1887 did not extinguish their right as reversionary heirs of her husband. Their Lordships found that when the elder widow took wrongful possession of the property she *claimed* an *absolute* title in herself on the death of her husband, and not the *limited* estate of a Hindu widow, and that not only were the rights of the son and his representatives (as was conceded in argument) but also the rights of the husband's reversionary heirs had been barred and extinguished long before the institution of the suit. The argument that such reversionary heirs' rights were not barred and extinguished was not tenable unless it were clearly shown that when the widow took possession she professed to do it as claiming only the *limited* estate of a widow. Such argument might be tenable if it were clearly shown that the widow took possession of the estate alleging, for instance, that the son was disqualified to inherit and that she was therefore entitled to a widow's estate; for independently of the

Two instances of a female (*not entitled* to a "widow's estate") dispossessing the *heir at law* and extinguishing his right.

P. C. case of Lachhan *v.* Manorath, discussed.

Claiming an *absolute* title, or a *limited* estate.

Right *claimed* is extinguished by sec. 28.

provisions of art. 141, the right which sec. 28 of Act XV extinguishes and indirectly confers on the party in possession is the right *claimed* by such party. (See p. 339, *supra*, and Vitholbowa *v.* Narayan, I. L. R., 18 Bom., 507). The decision of the Privy Council in Lachhan Kuar's case does not in any way question the correctness of the proposition that the *new* law would protect the reversionary heirs of the son if the son's widow is dispossessed by her mother-in-law on the false allegation that she had a preferable right to the property.

Dispossession by a relative or by a stranger.

The effect of a wrongful dispossession of the son's widow by her mother-in-law could not be different from that of a dispossession by an utter stranger. *Any* wrongful dispossession of the widow of the last male owner by *any* person was under the old law a cause of action to such widow as well as to the reversionary heirs. Notwithstanding any such dispossession of the widow, the reversioner is under the new law, entitled to a fresh right to sue on the death of the widow.

Alleged adoption or devise by last male owner.

If the defendant claims the property as a son adopted by the last male-owner, or as his devisee, that is, if he alleges a right which would prevent the estate of the female coming into existence, even then, the reversionary heir will be entitled to bring his suit for possession within twelve years of the death of the female. The operation of art. 141 cannot, it is apprehended, be affected by such allegations made by the defendant. If the defendant's alleged right is proved, the reversioner's suit will be dismissed on the merits, but if his allegations are not substantiated, there is no reason why the reversioner should not be entitled to the benefit of the provision of art. 141.

Male and female *reversioners.*

A suit by a *male reversioner* as well as a suit by a *female reversioner* (*e.g.*, a daughter entitled to possession on the death of the widow) falls under this article. (See Ramkali *v.* Kedar, I. L. R., 14 All., 156; Pritkoer *v.* Mahadeo, I. L. R., 22 Calc., 85, at p. 89, P. C.)

Civil death.

When a Hindu widow renounces the world, and becomes a *byragini*, she is civilly dead. Natural death and civil death lead to the same result. (See Amritalall *v.* Rajonikant, 23 W. R., 214, at p. 219; Nobokishore *v.* Harinath, I. L. R., 10 Calc., 1102, at p. 1108; Hemchunder *v.* Sarnomoyee, I. L. R., 22 Calc., 354, at p. 361).

Remarriage and forfeiture.

When a Hindu widow remarries, under the Act of 1856, all her rights in her husband's property cease and determine as if she is dead. (Act XV of 1856, sec. 2). But remarriage does not amount to death, natural or civil. Re-marriage is expressly referred to in art. 125, but not in this article. In a case under Act IX of 1871 it was held that the remarriage of a Hindu widow did not give the reversioner a new cause of action. (Gobardhon *v.* Balmukund, 7 N. W. P., 349). It has been suggested that art. 143 applies to cases of forfeiture under the Widow Re-marriage Act, XV of 1856. (Starling, 3rd Ed., p. 293).

Relinquishment by the widow.

Neither this article nor art. 125 refers to cases of *relinquishment* by the widow, in which the reversioner becomes entitled to the possession before her death, civil or natural. For the old law on this subject see Shaik Moteeullah *v.* Radha Benode, Calc. Sud. Dewani Rep. for 1856, p. 596. The *surrender* of the widow's life estate, or speaking more accurately the *relinquishment* or withdrawal of the whole of her qualified interest in a part or the whole of her husband's estate, accelerates the succession of the reversionary heir. (Beharilall *v.* Madolall, I. L. R., 19 Calc., 236, P. C.; Hem Chunder *v.* Sarnomoyee, I. L. R., 22 Calc., 354)

The relinquishment of his right of inheritance by an adopted son in favor of the adoptive mother may operate as a release of his proprietary rights and re-vest the inheritance in the adoptive mother, but the adopted son cannot renounce his *status* as adopted son, so as to preclude him from taking the property again on the death of the adoptive mother. (Mahadu *v.* Rayaji, I. L. R., 19 Bom., 239). A relinquishment by a Hindu widow in favor of the reversionary heir cannot, it is apprehended, determine the rights acquired by a *third* person as a lessee or an alienee of the widow. (See Heeromonee *v.* Gunganarain, 10 W. R., 384; 1893, 3 Ch. 48, at pp. 58, 62; p. 146, *supra*). The widow's relinquishment, specially of a part of the estate, in favor of the next reversioner cannot possibly be equivalent to death (natural or civil) within the meaning of art. 141. The reversioner's suit for possession, *during the life* of the widow who has relinquished her rights in his favor, is not governed by art. 141. If the suit falls under art. 144, the possession of the defendant, it has been held, will not be treated as adverse to the reversioner until the date of the relinquishment. (See the judgment of Norris and Beverley, JJ., in Appeals from original decrees Nos. 302 and 311 of 1889, decided on the 2nd of January 1891). Under art. 145, Act IX of 1871, or art. 144, Act XV of 1877, read with sec. 3 of the latter Act, the possession of the defendant during the lifetime of the widow does not become adverse to the reversioner as he does not claim from or through the widow. But if the widow while in possession of her husband's estate was dispossessed or discontinued the possession within the meaning of art. 142, the reversioner (in whose favor she has subsequently relinquished her interest) must bring his suit within the time allowed by art. 142. As the widow represents the whole inheritance, the reversioner has the *same* cause of action as the widow (see p. 562, *supra*), and the period of limitation must be computed from the date of dispossession or discontinuance, and not from the date of the relinquishment. (See Nobin Chunder *v.* Issur Chunder, 9 W. R., 505, F. B.) If the reversioner's suit is brought after the *death* of the widow, he will, it is apprehended, get a fresh start in *either* case, under the *express* provisions of art. 141 of Act XV corresponding to art. 142 of Act IX of 1871.

(Relinquishment by adopted son). Effect of relinquishment on reversioner and on *third* persons. Reversioner's suit (after relinquishment) may fall under art. 142 or 144.

Under the Regulations, as well as under Act XIV of 1859 (sec. 1, cl. 12), when a female heir (representing the estate of the last male owner) was dispossessed, such dispossession was a *cause of action*, not only to the female, but also to the reversioner. The latter had no *fresh* start from the *death* of the female. Though the expression "adverse possession" did not occur in sec. 1, cl. 12, Act XIV of 1859, the rule, practically, was that adverse possession which barred the widow barred the reversionary heir (Nobin *v.* Issur, 9 W. R., 505, F. B.; Amritolall *v.* Rajoneekant, 23 W. R., 214, P. C.) This is no longer the law in cases falling under art. 141. (Chundernath *v.* Asaram, 1 Shome, 167; Srinath Kur *v.* Prosunno, I. L. R., 9 Calc., 934, F. B.) The case of Saroda *v.* Doyamoyee, I. L. R., 5 Calc., 938 (in which it was held that the right of the widow must be one *in esse* at the time of her death, and that if her right is extinguished by limitation before her death, the reversioner cannot be said to be entitled to possession on her death), though approved of by Mr. Justice Kindersley (K. Subramaniam *v.* T. Subramaniam, I. L. R., 4 Mad., 124), has been overruled by the Full Bench. See also Dwarkanath v. Komolmoni, 12 C. L. R., 548; Kokilmoni *v.* Manick, I. L. R., 11 Calc., 791. The Full Bench ruling in Srinath Kur *v.* Prosunno, (I. L. R., 9 Calc., 934, F. B.) has been followed by the Bombay High Court in some cases. (See Cursandas *v.* Vundravandas, I. L. R., 14 Bom., 482, 488; Chhaganram *v.* Motigavri, I. L. R., 14 Bom., at p. 515; Mukta *v.* Dada, I. L. R.,

Old rule of limitation. Altered by the new. Calc. F. B. followed.

Allahabad F. B. case.

18 Bom., 216, 220). The Calcutta ruling has also been followed by a Full Bench of the Allahabad High Court. (Ramkali *v.* Kedar, I. L. R., 14 All., 156, F. B.) In Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512, the Lower Appellate Court referred to Srinath Kur's case, but the Madras High Court did not discuss the question raised in that case. In Harinath *v.* Mothurmohun, (I. L. R., 21 Calc., 8) their Lordships of the Privy Council say that the old rule of limitation has been altered by art. 142 of Act IX and art. 141 of Act XV.

Six or seven cases in which new rule (art. 141) can not be availed of.

It should be observed that if a reversioner's suit for possession after the death of the widow involves the *setting aside* of an adoption or of an instrument of alienation, some other article in the schedule *may control* the provisions of art 141. (Ramkali *v.* Kedarnath, I. L. R., 14 All., 156, at p. 159). As to adoptions, see p. 762, *supra*. As to instruments alleged to have been executed by the last *male* owner, see Mahabir *v.* Hurrihur, I. L. R., 19 Calc., 629 ; p. 736, *supra*. It should also be noted that a *special* law like sec. 20, of Act IX of 1859, may prevent the application of art. 141 to the reversioner's suit for possession. (Ramphul *v.* Badrinath, I. L. R., 13 All., 108, cited at p. 781, *supra*). If again the suit for possession was *barred while Act XIV of 1859 was in force*, art. 141 cannot revive a right so barred and give the reversioner a fresh right to sue on the death of the widow. (Drobomoyee *v.* Davis, I. L. R., 14 Calc., 323, at p. 344 ; Babu *v.* Bhikajee, I. L. R., 14 Bom., 317. See also Appassami *v.* Subramanya, I. L. R., 12 Mad., 26, P. C. ; Mohesh *v.* Taruck, I. L. R., 20 Calc., 487, at p. 497 P. C.) Similarly, if the reversioner is *bound by a decree* fairly and properly obtained against the widow, art. 141 does not enable him to bring a fresh suit on the death of the widow. Harinath *v.* Mothurmohun, I. L. R., 21 Calc., 8, P. C.) Art. 141 has no application whatever where the plaintiff is the *immediate* heir of the last male owner and not a *reversioner*. (See Krishnajee *v.* Morbhat, I. L. R., 13 Bom., 276). Nor does the article apply where the female is only a trespasser, and has *legally no estate* of the nature of a Hindu widow's estate. (See Koolapa *v.* Koolapa, I. L. R., 17 Mad., 34). A Division Bench of the Allahabad High Court held that where an alleged adopted son of a Hindu male proprietor took possession of the estate on his death to the exclusion of the widow, the reversionary heirs would be bound by the adverse possession suffered by the widow, and that art. 141 would not apply to their suit against such alleged adopted son. (Gandharp *v.* Luchman, I. L. R., 10 All. 485). But in Ramkali *v.* Kedarnath, I. L. R., 14 All., 156, at p. 160, Straight, J. points out that in Gandharp's case it was *conceded in argument* that (even under the new law) possession adverse to the widow was adverse to the reversionary heir also.

Sec. 28 does not extinguish reversioner's right.

As under the Hindu Law a childless widow fully represents the estate of her deceased husband, and as under sec. 28 of this Act, adverse possession for twelve years extinguishes her right to the estate, it may be *contended* that the right of the reversionary heirs is also extinguished by that section. But art. 141 must be read with art. 140 (I. L. R., 12 Calc., at p. 595), and as the so-called reversionary heirs claim under a title quite *independent* of the limited estate of the widow, the Legislature, it would seem, has (since 1871—73) *assimilated* the law as regards the so-called reversionary heirs to the law applicable to remaindermen and reversioners properly so-called. (See Srinath Kur *v.* Prosunno, I. L. R., 9 Calc., 934, at p. 937, F. B.) The judgment of the majority of the Judges in the Full Bench case unfortunately refers to art. 140 only of the Act, but the context shews very clearly that in the opinion of the majority of the Judges the so-called reversionary heirs are no

longer barred by adverse possession suffered by the widow. (See the judgment of Norris and Macpherson, JJ., in Harinath *v.* Mothurmohun, I. L. R., 21 Calc., 8, at pp. 10 and 11). An heir-at-law of the widow claims under or through the widow, but the so-called reversionary heir does not "derive his right to sue from or through" the widow. If the reversioner's suit for possession falls under art. 144, the defendant cannot, under that article, contend that adverse possession against the widow is adverse to the reversioner. As the reversioner does not claim through the widow, the defendant cannot tack the period of his adverse possession against the widow, to the period of his adverse possession against the plaintiff. (See the interpretation of the term plaintiff in sec. 3). As an instance where neither art. 141 nor art. 142 applies to a reversioner's suit for possession we may take the case of a Hindu widow whose husband's estate is on his death taken possession of by a trespasser claiming to be an adopted son or a devisee of her husband, and where such widow subsequently relinquishes her interest in favor of the reversionary heir. In such a case the reversioner's suit for possession before the death of the widow will be governed by art. 144, and the defendant will not be allowed to tack the period of his possession against the widow, to the period of his possession against the plaintiff since the relinquishment. But the principle of the old ruling in the Full Bench case of Nobinchunder *v.* Issur, 9 W. R., 505, is, it is apprehended, still applicable to a Hindu reversionary heir's suit for possession if art. 142 be applicable to it. (See p. 825, *supra*). Under the old law (Act XIV of 1859, sec. 1, cl. 12) all suits for possession of immoveable property were required to be brought within twelve years from the time the *cause of action* arose. And as the reversioner had the *same* cause of action with the widow (see p. 562, *supra*) he could not count the period of twelve years from the date of the death of the widow. The period of twelve years allowed by Act XIV of 1859 was therefore computed from the date when the widow was dispossessed. And adverse possession against the widow was practically adverse to the reversioner. Under art. 144 of Act XV of 1877 the twelve years are *expressly* required to be computed from the time when the defendant's possession becomes *adverse* to the plaintiff. But as the reversioner does not claim from or through the widow, adverse possession against the widow is not adverse possession against the plaintiff within the meaning of art. 144. Under art. 142 the period of twelve years is computed from the date of the dispossession or discontinuance of possession which is a "cause of action" to the widow as well as to the reversioner. Where art. 142 is applicable, the result would be the same as it was where sec. 1, cl. 12 of Act XIV of 1859 was applicable.

Under art. 144, possession adverse to the widow is *not* adverse to the reversioner.

Otherwise, if art. 142 be applicable.

Whether the twelve years expired during the widow's lifetime, or not, if she brought a suit for possession and her suit was dismissed without any fraud or collusion on her part, the reversioner's suit, after her death, will be barred by the doctrine of *estoppel* and *res judicata*. (See the Shiva Gunga case, 2 W. R., P. C., 31). Even a decree founded upon the law of limitation obtained against the widow will (notwithstanding art. 141 of the present law) preclude the reversioner from recovering possession of the estate after the death of the widow. (Harinath *v.* Mothurmohun, I. L. R., 21 Calc., 8, P. C., see also p. 822, *supra*).

Res judicata and estoppel.

There is no difficulty where the defendant is an alienee of the widow, or a son adopted by her after her husband's death. On general principles of law (old or new) the possession of the alienee or the adopted son claiming under the widow's own act cannot be adverse

Alienation or adoption by the widow.

even to the widow. (See note 7, p. 155, *supra*, and Sreenath *v.* Mohesh, 12 W. R., F. B., 14). It has been held that in the case of an improper alienation or adoption by the widow, the reversionary heir may sue within twelve years of her death. Even after the recent Privy Council Decision (see p. 762, *supra*) it has been held that art. 118 cannot affect a reversioner's suit under art. 141. (Nathu *v.* Gulab, I. L. R., 17 All., 167). As to alienations, see Gya Prasad *v.* Heet Narain, I. L. R., 9 Calc., 93 ; Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512. See also I. L. R., 4 Calc., 523, and I. L. R., 10 Calc., 324, and other cases cited under art. 125. If the mother of a deceased Hindu holds his property adversely to his legal heir and representative, *viz.*, his widow, and then alienates the same to the defendant, the possession of the mother and of her alienee is adverse to the reversionary heir ; and if such adverse possession extended over a period of twelve years *before* Act IX of 1871 came into force, the reversioner cannot have a new cause of action on the death of the widow. (Babu Valad *v.* Bhikaji, I. L. R., 14 Bom., 317). It has been held by a Division Bench of the Madras High Court, that even before art. 141 of Act XV of 1877 and the corresponding article of Act IX of 1871 came into operation, the possession of the whole inheritance by an alienee of one of two Hindu daughters, was not adverse to the male reversioner until the date of the death of the second daughter who survived the first ; and that the title acquired by the alienee by twelve years' adverse possession against the surviving daughter could not be higher than what she might have created by a conveyance of her limited interest. (Sambasiva *v.* Ragava, I. L. R., 13 Mad., 512). But though the two daughters took the inheritance jointly as one estate, and though the defendants entered into possession under an *alienation* by the first daughter who alone had been in possession, the surviving daughter, it is apprehended, was the representative of the whole inheritance, at least, after the death of her sister. And under the old law (9 W. R., 505, F. B. and 23 W. R., 214, P. C.) the period of limitation, as against the male reversionary heir, in the absence of fraud, should have been reckoned from the time at which it would have been reckoned against the surviving daughter if she had lived and brought the suit against the defendant. And twelve years' adverse possession suffered by the surviving daughter, supposing the twelve years expired before the new law of 1871 came into operation, not merely transferred her limited personal interest, but extinguished the title to the inheritance which she represented for the time being, in favor of the possessor. In a somewhat similar case, where the second daughter's son sued to recover half of the lands which originally belonged to his maternal grand-father and which share of the lands he alleged had been alienated by his aunt the first daughter, it was held by the Calcutta High Court that, as the second daughter, who survived the first, was entitled to take the whole of the lands on the death of the first, the possession of the half share by the alienee, was adverse to the second daughter from that date, and therefore (under the old law) adverse also to (the plaintiff) the reversionary heir. (Gunga Churn *v.* Juggernath, 12 W. R., 97). In Ragava *v.* Sambasiva, (1 Mad. Law Journal, p. 392), the Madras High Court reviewed their judgment in I. L. R., 13 Mad., 512, and held that (under the old law) the possession of the alienee of one of two females was adverse to all persons representing the inheritance *except* the alienating female, and that the alienee was a trespasser against the *other* female and the reversioner. Since the Act of 1871, it does not matter whether the defendant is in possession as an alienee or as a trespasser. In either case, the reversioner has 12 years from the death of the female.

Alienation by an usurper of the widow's estate.

Alienation by one of two females.

No distinction under new law.

As to the *onus* of proving the death of the female, see p. 110, *supra*. As to adverse possession in reference to the widow's estate, see pp. 154—157, *supra*. *Onus.*

Where property vests in two females *jointly*, and on the death of one of them the other takes the whole by survivorship, limitation under this article runs from the date of the death of the surviving female. (Gobind *v.* Dulmeer, 23 W. R., 125). See also Carsandas *v* Vandrabandas, I. L. R., 14 Bom., 182, where the testator gave his widows a limited estate, but his main bequest being declared void, they jointly took an ordinary "widow's estate." See also p. 780, *supra*, and I. L. R., 22 Calc., 85, at pp. 88, 89, P. C. Case of *two* females.

Mahomedan widows in the Punjab often holds something like a Hindu widow's estate in their husband's property. A Hindu daughter, mother and other female heirs, besides the widow, come under the term "Hindu female." (See Kokilmonee *v.* Manick, I. L. R., 11 Calc., 791). Art. 142 of Act IX referred to *Hindus*, and to Hindu *widows* only. It has been said that art. 142 of Act IX of 1871 did not apply to the case of daughters and mothers. (Sankaran *v.* Periasami, I. L. R., 13 Mad., 457, at p. 470). But the expression "Hindu widow" in Act IX probably meant a *female entitled* to a "Hindu widow's estate." Mahomedans. Females *other* than widows.

Art. 141 of Act XV (like art. 142 of Act IX) applies to suits by reversioners on the death of a widow (or other female) *holding* a woman's *qualified* estate. Where a Hindu widow who *has no right* to such an estate in an impartible zemindary maintains possession against the rightful heir, her possession is adverse to him and to all claiming through him, and no fresh right accrues to him or his representatives on her death. The rightful heir not being a *reversionary* heir, art. 141 is inapplicable to his suit. (Koolapa v. Koolopa, I. L. R., 17 Mad., 34). An adopted son is *not* a *reversionary* heir after the widow. Art. 141 is therefore inapplicable to a suit by an adopted son against a person who had before the adoption held the estate adversely to the widow. (Krishnaji *v.* Morbhat, I. L. R., 13 Bom., 276; p. 781, *supra*). But where the widow is really entitled to a woman's qualified interest, and there is a *reversionary* heir after her, art. 141 will apply to a suit for possession by the latter after the death of the former, provided the cause of action accrued *after* the death of the last male owner. An assertion of an adverse title by such a widow, or by another with her connivance, cannot affect the reversioner's suit for possession under art. 141. (See pp. 154, 155, *supra*). It is not in the power either of the widow or of the executor of her husband or of any person claiming either through or against such widow or executor to affect the operation of art. 141. (Cursandass *v.* Vandravandas, I. L. R., 14 Bom., 482, at p. 489). See pp. 822-824, *supra*.] A female, *not entitled* to a widow's estate. An heir-at-law, *not* a *reversionary* heir. Assertion of an adverse title by the widow.

142.—For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	...	The date of the dispossession or discontinuance.	Art. 142.

[No. 142. (No. 143, Act IX). As to what is possession, see pp. 113-124, *supra*. As to what amounts to dispossession or discontinuance of possession, see pp. 125-131, *supra*. Dispossession implies the coming in of a person and his driving out the others from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by others. In cases of Dispossession and discontinuance.

constructive possession an actual driving out, or an actual going out of possession is not necessary. (Rains *v.* Buxton, 14 Ch. Div., 537).

Intentional discontinuance.

Even a person who discontinues possession of land with *no intention* of returning to it, has twelve years under this article within which he may change his mind. (Sain *v.* Ghula, Punj. Record, No. 85 of 1892, F. B.; Starling, 295; Rivaz, 209).

Possession is exclusive.

Possession in a legal sense is exclusive. Only one person can be in possession of the same thing at the same time. The law does not allow possessions to conflict. No mixed or opposing possessions are recognised by the law. The joint possession of two co-owners is exclusive possession so far as all *others* are concerned. The two co-owners are looked upon as one person. (See notes pp. 123, 128, *supra*). Possession of an *exclusive* character is necessary in order to establish a prescriptive right. (Lord Advocate *v.* Young, 12 App. Cas., 544, at p. 545). Joint possession by persons claiming a joint right may establish a joint right. But a case of joint possession should be distinguished from a case of exclusive possession of *portions* of the same property at *different* periods, or a case of *contrario possessio*. (See Nilakandan *v.* Padmanasha, I. L. R., 14 Mad., 153, at p. 162). In the case of the foreshore, what is sometimes referred to as *contrario possessio* is better described as concurrent possession by members of the public who have no grant or license from the Crown. Acts done without title, as the removal of clay and stones from the foreshore at three several periods tend to derogate from the possession of the riparian proprietor, and if carried far enough will deprive his possession of that *exclusive* character which is necessary in order to establish a prescriptive right. (Lord Advocate *v.* Young, 12 App. Cas., 54, at p. 554).

Contrario possessio.

'Adverse.'

The word 'adverse' occurs only in arts. 124 and 144, and does not occur in this or any other article. In Gobindlall *v.* Debendro Nath Mullick (I. L. R., 5 Calc., 679) Wilson, J., was of opinion, that the framers of the Act were minded to get rid of the distinction between adverse and non-adverse possession whenever it could be done, and whenever any other test could be found. With reference to art. 142, the learned Judge held that where there had been possession followed by a discontinuance of possession, time ran from the moment of its discontinuance, whether there had or had not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession had been discontinued. And it

Permissive possession.

was suggested that, when a friend, relative or other person was permitted to enter into possession, the true owner could protect himself only by establishing the relation of landlord and tenant between himself and the person so put in possession, or by insisting on periodic written acknowledgments of his title. But the permissive occupation or detention, in such cases, is legally no possession at all (see p. 119, *supra*); and the owner cannot, strictly, be said to be 'dispossessed' or to have 'discontinued his possession.' It was accordingly held, on appeal in the same case, that where the owner, in the *exercise* of his proprietary *right*, *permits* some other person to occupy his land, or to receive his rents, then (whether the relation of landlord and tenant exists between the parties or not) the possession of the owner is not discontinued, because, under such circumstances, the possession of the occupier is the possession of the owner. (Per Garth, C. J., I. L. R., 6 Calc., 311, 315). A suit by the true owner

Dispossession and discontinuance.

for the recovery of immoveable property, in such cases, is not governed by art. 142. The words "dispossession" and "discontinuance" apply only to cases where the owner of land has either by his own act or that of another, been deprived altogether of his dominion over the land itself, or the receipt of its profits. If the

permissive occupant proves that the character of his possession has *subsequently* become adverse to the owner (Ramdhun *v.* Nobin, 12 W. R., 250, and p. 140 *supra*), and that he has been in adverse possession for twelve years, the suit will be barred by art. 144. (See Gobindloll *v.* Debendro, I. L. R., 6 Calc., 311). If a claim really falls within the terms of art. 142, it is unnecessary to enquire whether the defendant's possession was *adverse* or when it became *adverse* to the plaintiff. (See Nawab Muhammad *v.* Badan, I. L. R., 17 Calc., 137, P. C. and pp. 127, 686, *supra*). Permissive possession becoming adverse.

To bring a case within art. 142, there must be both absence of possession by the rightful owner, and actual possession by another. There must be *another* person against whom the true owner may bring an action of ejectment, and in whose favor limitation may run. (See Agency Co. *v.* Short, 13 App. Cas., 793; and p. 125, *supra*). This *other's* possession must of course be possession on his own behalf, and not with the permission of the owner. There must be *another* person who may be sued in ejectment.

Every landholder holding possession by a tenant, and every tenant holding actual possession under him understands by "possession" not merely actual possession, but also receipt and payment of *rent*. (Per Muthusami Aiyar, J., in Innasi *v.* Sivagnana, 5 Mad. L. J., 95). See also Mullick *v.* Muleka, I. L. R., 10 Calc., 1112; p. 655, *supra*. Receipt of rent.

In every case in which the statute is set up as a bar to the true owner by virtue only of the receipt of *rent* from the *tenants* in possession, such receipt of rent in order to exclude the true owner must always be by a person *wrongfully* claiming, and not receiving or claiming to receive *on behalf* of the true owner. (Lyall *v.* Kennedy, 14 App. Cas., 437, at pp. 457, 460. See also p. 141, *supra*). Receipt of rent by a person who professes to act as the agent of the true owner, whoever he may be, does not interrupt the legal possession of the land by the true owner. (*Ibid.*, p. 457; note 9, p. 305, *supra*). Receipt by person wrongfully claiming to be entitled.

As a trespass to moveable property may not amount to a *conversion*, so a trespass to immoveable property may not amount to an *ouster* or *dispossesion*. A trespass must be acquiesced in by the party in possession, before he may be said to be *out of possession*. (See pp. 116, 117, *supra*). Trespass and ouster.

The terms "possession" and "dispossession" are not necessarily inapplicable to incorporeal hereditaments. (Per Pigot, J., in Fadu Jhala *v.* Gour Mohun, I. L. R., 19 Calc., 544, at pp. 555, *et. seq*). The Preamble and Part IV of Act XV of 1877 speak of the acquisition of *easements* by *possession*. Incorporeal hereditaments.

According to White, J., the term "dispossession" does not apply to a case where property is submerged by an act of God and so made impossible of actual possession; and where the defendant takes wrongful possession of a chur as soon as it is re-formed on the original site of plaintiff's diluviated estate, plaintiff's suit for recovery of the land (specially if it has again diluviated and again re-formed), is not a suit for possession as upon a *dispossession*, but is governed by art. 144. (See Kali Churn *v.* Secretary of State, I. L. R., 6 Calc., 725, at pp. 738, 739). But as it may be said that the plaintiff constructively held possession of the original site of the land while it was under water before the first re-formation, he may be *deemed* to have been dispossessed by the defendants when the latter first took possession of the chur. (I. L. R., 6 Calc., at p. 736). But whether art. 142 or art. 144 applies, the result is the same in either case. As the law at present stands, a wrong-doer's possession may ripen, as it were under the water, into a title, although his actual and possible occupation of Possession and dispossession of land under *water*.

Possession of land which diluviates, when abandoned.

the land in question only continued for a year. (*Ibid*, p. 739, see also p. 126, *supra*). It may be here observed that, strictly speaking the wrongful possessor of land does not, on its diluviation, abandon his possession of it, if he does not abandon his intention or determination to possess the same. If he continues to pay the rent or revenue due upon the land so diluviated or submerged, or if it otherwise appears that he does not abandon the intention to occupy or enjoy the land as soon as it shall be re-formed on its original site, there is no such voluntary abandonment of possession as there was in the Privy Council Case of Agency Co. *v.* Short above cited. Notwithstanding the so-called abandonment of diluviated land by such possessor, he continues to be legally in possession of the same (see pp. 115-117, *supra*), and the true owner cannot contend that his possession is restored on the second diluviation of the land.

Ouster of one of two co-owners.

The mere cultivation of a part of the lands held by two persons in common, by one of them is not necessarily an ouster of the other. Even if the former sets up the case that as a co-sharer he is entitled to cultivate the part exclusively, and to say to the latter, "You are not to interfere with these lands, you may, if you like, enjoy other lands for your share," there is *no* ouster for which the latter may sue for joint possession. If the former resisted and prevented the entry of the latter not simply with the object of protecting himself in the profitable (and not unsuitable) use of the lands in his occupation, out in denial of the latter's title, the latter might have treated such resistance as an act of ouster or dispossession. But there being no denial of his title, and the cultivation being proper and suitable, the latter co-sharer is not even entitled to an injunction restraining the former from proceeding with his cultivation. A money compensation in respect of the exclusive use by, and benefit to, the one co-sharer may be awarded to the other. (Watson *v.* Ramchand, I. L. R., 18 Calc., 10, P. C., reversing Ramchand *v.* Watson, I. L. R., 15 Calc., 14). See p. 160, *supra*. As to whether the ouster of a lessee during the continuance of the lease, affects the lessor see p. 143, *supra*. As to ouster of one co-owner by another, see p. 160, *supra*.

Ouster of lessee.

Immoveable *property*, and *interest* in such property.

Art. 144 expressly provides for suits for possession of "immoveable property or an interest therein." Art. 142 does not expressly refer to "interests" in immoveable property. But according to Prinsep and Pigot, JJ., the Legislature did not by this difference intend to draw any distinction between different classes of property such as corporeal property and incorporeal interests. (See I. L. R., 19 Calc., pp. 551, 559. See also pp. 205, 389, 650, *supra*). But O'Kinealy, J., is of opinion that the words "*interest* in immoveable property," refer to an interest *less* than the fee simple, and include incorporeal hereditaments, and that the term "immoveable property" does not include such *interests*. (*Ibid*, p. 563). In Narayan *v.* Vasudeo, I. L. R., 15 Bom., 247, at p. 255, Telang, J., without discussing the question raised in the Calcutta case held that the right of the head of a number of co-sharers in a certain kind of immoveable property to the exclusive management thereof is an *interest* in immoveable property within the meaning of art. 144. Similarly Jardine, J., (in Bapu *v.* Dhondi, I. L. R., 16 Bom., 353, held that a suit for possession of fruit trees on plaintiff's own land, is a suit for the possession of an *interest* in immoveable property within the meaning of art. 144. But Parsons, J., in the same case, held that art. 142 (which speaks of "immoveable property" only) was applicable to the suit as laid by the plaintiff. Mr. Justice Muthusami Aiyar agrees with Prinsep and Pigot, JJ., in holding that the term "immoveable property" includes incorporeal hereditaments. (Innasi *v.* Sivagnana, 5 Mad. L. J., 95).

The question of limitation under this article does not depend on continuous possession for twelve years by the defendant, but on the fact that more than twelve years have elapsed since the plaintiff was dispossessed or discontinued the possession. The last of several successive but independent trespassers, may. therefore, defeat the plaintiff's suit although he himself has been in possession for only a few days before the suit. (See pp. 16, 334, *supra*, and compare art. 144). If the land was not left *vacant* for any time since the plaintiff was dispossessed or discontinued his possession, that is, if the successive and independent trespassers kept the plaintiff *continuously out of possession*, and there was no *interval* during which he could be *deemed* to have been restored to possession, the plaintiff's suit would be barred by limitation. (See Willis *v.* Earl Howe, 1893, 2 Ch. 545, at pp. 553, 554). If, however, one trespasser abandons his possession *before* the owner's right is extinguished, and the land is *not immediately* taken possession of by a second independent trespasser, that is, if there is an *interval* between the abandonment of possession by the first trespasser, and the entry into possession by the second, the owner will be deemed to have been restored to possession on such abandonment, and again dispossessed on such entry; and limitation in favor of the second trespasser will run only from the date of such entry by the latter. In a suit by the true owner against the second intruder, the former may discharge the *onus* of shewing possession within twelve years by proving that the first intruder abandoned his possession within twelve years of the suit. On an intruder's abandonment (*before* he acquires a title under sec. 28) the owner is remitted to his old possession, and limitation ceases to run because there is *then* no person in whose favor it may run. For the *continuance* of the running of time there must always be some one against whom the owner can bring an action of ejectment. (See pp. 107, 115, 125, 169, *supra*, and Agency Co. *v.* Short, 13 App. Cas., 793). If a second trespasser dispossess the first after the plaintiff has sued the first trespasser for possession, a second suit against the second trespasser is not barred, if it is brought within twelve years of the date when the second trespasser took possession of the property. A, B, and C are dispossessed of certain lands by D. They bring a suit for possession and obtain a decree against D. While this suit is pending in appeal, and before symbolical possession is delivered to the plaintiffs in execution, C, in the assertion of a different right, contrives to dispossess D, and takes wrongful possession of the whole property. A and B then sue C for possession of their shares. This second suit is governed by art. 144. It is not a case of dispossession while the plaintiffs were in possession. (Ramkishore *v.* Bandikaratan, I. L. R., 13 Cal., 203).

What bars suit under this article.

Abandonment of possession by intruder before owner's right is extinguished.

First intruder dispossessed by a second while suit for possession is pending.

Art. 144 of Sch. II of Act XV of 1877, as to adverse possession gives the rule of limitation, only where there is no other article in the schedule specially providing for the case. The proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished; but if a claim comes within the terms of art. 142 (enacting that when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued possession, limitation shall run from the date of dispossession or discontinuance), in such a case, by the law of Act XV of 1877, and previously of Act IX of 1871, adverse possession is not required to be proved in order to maintain a defence. At the regular settlement in the Delhi District (1843) the plaintiffs' ancestors, *ex-mafidars* of a plot on which the rent-free tenure had been resumed in 1838, declined to engage for the revenue; and the plot was assessed along with the village in which it was; the village proprietors through the *lambardars* engaging for and obtaining the land. At the revision of

Adverse possession *not* required to be proved, under art. 142.

settlement, more than thirty years after, the plaintiffs claimed possession, alleging their title, and pleading that the village co-parceners held only in farm from the Collector for the period of settlement: *Held*, that there had been a dispossession, or discontinuance of possession, within the meaning of art. 142; and that whether any proprietary right had existed or not in the plaintiffs' ancestors, the twelve years' limitation ran from the date of the dispossession or discontinuance. (Nawab Muhammud *v.* Badan, I. L. R., 17 Calc., 137, P. C.) In this case, although the settlement of 1843 was a temporary settlement, the right of the ex-mafidars was not recognised by the Collector in any way, and no distinction was made between the way in which the *mafi* land and the other land, of which the defendants were undoubtedly maliks, was to be held. (See p. 686, *supra*). As the plaintiff had no possession of any description since 1843, their case was a case of dispossession or discontinuance of possession under art. 142; and as the word "adverse" does not occur in that article, their Lordships of the Privy Council considered it unnecessary to enter upon an enquiry as to whether the defendant's possession was adverse to the plaintiff, or otherwise.

Suit by vendee, lessee, or heir,—not upon a *dis*-possession.

A suit by a vendee or lessee for delivery of possession by the vendor or lessor is not a suit for recovery of possession upon a dispossession or discontinuance of possession. It is rather a suit for acquiring possession by enforcing the specific performance of a contract between the parties. A suit for possession by an heir-at-law of B against a person who claims the property under an alleged bequest by B, is also not a suit under art. 142. But a suit for possession by the heir-at-law of property from which his father had been dispossessed during his lifetime is governed by art. 142. For other instances see notes to art. 144.

Onus of proof in suits under art. 142 and under 144.

In suits under art. 142 for possession, as upon a dispossession or discontinuance of possession, the *onus* is on the plaintiff to prove that he, or the person under whom he claims, was in possession within twelve years of the institution of the suit. (See pp. 96, 109, *supra*; and Bhootnath *v.* Kadernath, I. L. R., 9 Calc., 125; Mahomed Ali *v.* Khaja Abdul, I. L. R., 9 Calc., 744, F. B.; Gopal *v.* Nilmoney, I. L. R., 10 Calc., 374; Mohima Chunder *v.* Mohesh Chunder, I. L. R., 16 Cal., 473, P. C.; Kashinath *v.* Sridhar, I. L. R., 16 Bom., 343). As to how this rule is modified in cases where the land is shown to have been in a condition unfitting it for actual enjoyment in the usual modes, see I. L. R., 9 Calc., 744, F. B.; and pp. 95, 99-110, *supra*. Even possession constructively acquired by the true owner on abandonment of possession by an intruder is sufficient to bar limitation. As to suits falling under art. 144, see Faki *v.* Babaji, I. L. R., 14, Bom., 458; Hanumunta *v.* Mahadeo, I. L. R., 18 Bom., 513; Parmanund *v.* Sahib, I. L. R., 11 All., 438; Jafar *v.* Mashug, I. L. R., 14 All., 194. In the two Bombay cases it was held that under art. 144, the *onus* is on the defendant to prove twelve years' adverse possession, and in the two Allahabad cases it was pointed out that even under art. 144, the plaintiff must give some *primâ facie* evidence that his suit is not barred by limitation. (See pp. 92-96, and p. 109, *supra*). See Rajkumar *v.* Gobindchunder, (I. L. R., 19 Calc., 600, P. C.) as to the presumption of continuance of previous possession where title has been proved. (It may be mentioned here that the *onus* of proving a disputed boundary line running between waste lands which have not been the subject of definite possession, lies *equally* upon the plaintiff and the defendant. The parties to the suit in such a case are in the position of counter claimants. See Lukhinarain *v.* Jodunath, I. L. R., 21 Calc., 504, at p. 511, P. C.) Where a zemindar sued for *khas* possession of certain plots of land which

(Disputed boundary between waste lands).

the defendant claimed as a part of his tenure or holding under the zemindar but failing to establish his plea urged that the suit was barred by limitation, the Court of first instance dismissed the suit on the ground that the plaintiff had failed to prove *khas* possession within twelve years of the institution of the suit. But as the defendant could not prove more than eleven years' adverse possession, the High Court decreed the suit presuming plaintiffs' possession before the 11th year on the ground that his *title* to the land was admitted or proved. (Gopal *v.* Rajah, First Appeal No. 49 of 1893 decided by Ghose and Gordon, JJ. on 22nd June 1894). Landlord's suit for *khas* possession.

A decree for recovery of possession of land and the execution of such decree, although only symbolical possession is delivered by the executing Court, put an end altogether to limitation. (Gunga Gobind Mundul *v.* Bhoopal Chunder, 19 W. R., 101, P. C.) If the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits from the tenants, the plaintiff would have twelve years from such dispossession to bring another suit. (Juggobundhu *v.* Ramcharan, I. L. R., 5 Calc., 584, F. B.) The formal delivery of possession of immoveable property under sec. 263 or sec. 318 of Act XIV of 1882, is equivalent to a complete transfer of actual possession. In one case Jackson and Macdonell, JJ., were of opinion that symbolical possession of property in the *occupation* of the defendant or judgment-debtor was not sufficient to give the plaintiff a fresh start. (Shoteenath *v.* Obhoy, I. L. R., 5 Calc., 331). But in a later case, Garth, C. J., and MacDonell, J., held that putting the plaintiff in possession of such property by proclamation and beat of drum under sec. 264 (or sec. 319) instead of putting him in actual possession under sec. 263 (or sec. 318) was sufficient for all purposes of limitation. Any formal mistake made by the officer of the Court in the mode of delivery could not prejudice the plaintiff. (Lokessur *v.* Purgun, I. L. R., 7 Calc., 418). But cf. Lakshman *v.* Moru, I. L. R., 16 Bom., 722, 728. See pp. 118, 812, 813, *supra*. Symbolical or formal delivery of possession by Court.

Suits for recovery of possession by an occupancy raiyat under the Bengal Tenancy Act, 1885, are specially provided for by that Act. Act VIII of 1869, B. C., as well as Act X of 1859, made special provisions for such suits by tenants. (See Gooroodas *v.* Ramnarain, 7 W. R., 186, F. B.; Jonardan *v.* Haradhan, 9 W. R., 513, F. B.; Golab Ali *v.* Kootos, I. L. R., 4 Calc., 527; Kalidas *v.* Ramhari, I. L. R., 5 Calc., 37, Forbes *v.* Sree Lall, I. L. R., 8 Calc., 365; Imam Bux *v.* Moni, I. L. R., 9 Calc., 280; Joyanti *v.* Mahomed, I. L. R., 9 Calc., 423; Srinath *v.* Ram Ratan, I. L. R., 12 Cal., 606; Basurat *v.* Altaf, I. L. R., 14 Cal., 624; Chunder *v.* Mukhori, I. L. R., 15 Cal., 450). Act X of 1859 and (Bengal) Act VIII of 1869 prescribed a limitation of one year to "all suits to recover the occupancy of any land, farm or tenure, from which a raiyat, farmer, or tenant had been illegally ejected by the person entitled to receive rent for the same." Art. 3, Sched. III of Act VIII of 1885 (the Bengal Tenancy Act) prescribes a period of two years for suits "to recover possession of land claimed by the plaintiff as an occupancy-raiyat." It has been held that though the words "ejected by the person entitled to receive rent for the same" are not to be found in art. 3 of the Tenancy Act, the suit mentioned in that article means a suit by an occupancy-raiyat as such, that is, an occupancy-raiyat claiming a right of occupancy as against his landlord. (Chunder *v.* Mukhori, I. L. R., 15 Calc., 450). Suits for recovery of possession by farmers and tenants other than occupancy-raiyats are not governed by the two years' rule laid down by the Bengal Tenancy Act. Art. 142 of Act XV of 1877 will apply to such suits. All tenants (dispossessed otherwise than by due course of law) are, of course, entitled to sue under sec. 9 of the Suits to recover possession by *tenants* in Bengal.

Specific Relief Act, and art. 3 of Act XV of 1877. And they may recover possession without reference to the title of the landlord to eject them. (See Jonardun *v.* Haradhun, 9 W. R., 513, F. B.) But is any suit by any occupancy-raiyat to recover possession of land from which he has been dispossessed by his landlord now governed by the general law contained in art. 142 of Act. XV ?

Where the tenant's *title* is in question.

Under Act X of 1859 and Bengal Act VIII of 1869, in the correspnding provisions of which, the words "illegally ejected by the person entitled to receive rent for the same" occurred, it was held that the special limitation provided for by those Acts did not apply where the suit was one to try a *bonâ fide* question of title ; and that where the plaintiff claimed to establish a title which the landlord did not confess and avoid, but denied from the commencement, he could bring his suit within the general period of twelve years from the date of dispossession. (See Gooroodas *v.* Ramnarain, 7 W. R., 186, F. B., Srinath *v.* Ramrutton, I. L. R., 12 Calc., 606 ; Basarat *v.* Altaf, I. L. R., 14 Calc., 624). Art. 3, Sched. III, Act VIII of 1885, does not speak of "illegal ejectment " by the defendant. The words are very general. It is apprehended that if the plaintiff claiming an occupancy-right sues his landlord to recover possession, he must, whether his title to the holding is in issue or not, bring his suit within the two years allowed by the special law. And it has been so held in Saraswati *v.* Haritarun, I. L. R., 16 Calc., 741 ; Ramdhun *v.* Ramcoomar, I. L. R., 17 Calc., 926. As to suits for recovery of possession by raiyats who have not voluntarily abandoned their holdings but where their holdings have been treated by their landlords as abandoned, see sec. 87, Act VIII of 1885].

Art. 143.	143.—Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years ...	When the forfeiture is incurred or the condition is broken.

[No. 143 (No. 144, Act IX). Cf. Act VIII of 1885, Sched. III, Art. I, which prescribes a limitation of one year only.

Decided cases on forfeiture.

The operation of this article has been considered in Sadha *v.* Mussamat Bhagawani, 7 N. W. J., 53, and in Bibi Sahodra *v.* Rai Jan Bahadur, I. L. R., 8 Calc., 224, P. C. In the latter case it was held that no condition attached to the life-estate in question, and that there was no forfeiture of it by reason of the alienation of the estate by the life-tenant ; but it appears to have been assumed that if there had been a forfeiture, a suit by the reversioner for possession might have been barred under this article, although it was brought within twelve years of the time when the reversion naturally fell into possession, by the death of the life tenant. Under the terms of a *solenamah*, a life estate in the property was given to a Hindu widow, on condition that she should not alienate the property which was to vest in her cousin after her death. Such a condition does not prohibit an alienation which shall be good only for the widow's life time. Even if this were a condition against *such* an alienation, there is neither any rule of law nor anything in the words of the *solenamah* attaching *fofeiture* to the breach of such a condition or otherwise *entitling* the cousin to sue for possession on the ground of a breach of condition. (See *Ibid.*, I. L. R., 8 Calc., 224). In the former case it was held that although the defendant, a usufructuary mortgagee for the term of twenty years, had incurred a forfeiture of his rights by reason of his failure, in the very first year, to pay the mortgagor the annuity stipulated for in the deed of mortgage, each successive

failure of payment gave the mortgagor a *new* right to eject the mortgagee; and that the suit was within the time under the provisions of sec. 23, Act IX of 1871. But under Act XV, only suits for *compensation* for successive breaches are provided for by art. 115, and there are no similar provisions which can apply to suits for *possession* by reason of successive breaches of condition. (See notes to sec. 23, and Bhojraj *v.* Gulshan, I. L. R., 4 All., 493). Where, under the terms of a lease, an alienation by the lessee works a forfeiture of the tenure, a suit to eject the tenant must be brought within twelve years under this article. (Madavan *v.* Athi, I. L. R., 15 Mad., 123). Art. 143 is silent as to whether the plaintiff may or may not waive a forfeiture. (See notes to arts. 75, 139 and 140; pp. 716, 816, 820, *supra*). Compare sec. 4 of 3 and 4 William IV, c. 27, which *expressly* preserves the old English law that no one is obliged to take advantage of a forfeiture. If no new arrangement has been come to between the parties, and the suit is brought to enforce the forfeiture under the terms of the original grant, &c., the suit, it is apprehended, must be brought within twelve years of the time when the forfeiture was incurred. Art. 143 is *not* applicable to suits in which the property has vested in *trust*, for a specific purpose, and there has been a *continuous* breach of trust. (Sothappayya *v.* Periasami, I. L. R., 14 Mad., 1, at p. 8, and p. 594, *supra*).

For *possession* on successive breaches. Lessee's alienation. Waiver. Continuous breach of *trust*.

Mr. Starling observes that when a Hindu widow remarries and forfeits her rights to her husband's estate, under sec. 2, Act XV of 1856, the reversionary heir must bring his suit for possession of the estate within the time allowed by this article.

Remarriage of widows.

Art. 1, Sched. III of the Bengal Tenancy Act prescribes a period of one year for the landlord's suit for ejectment for the breach of a condition. See notes to art. 139.]

Tenancy Act, Bengal.

144.—For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years ...	When the possession of the defendant becomes adverse to the plaintiff.	Art. 144.

[No. 144. (No. 145, Act IX; sec. 1, cl. 12, Act XIV).

A "suit for possession" is not necessarily a suit for physical possession. An interest in immoveable property does not, in many cases, admit of physical possession. Possession by receipt of rent, as well as actual occupation, is possession within the meaning of this article.

Possession.

As to whether "property" and "*interest* in property" refer to two classes or kinds of property, see notes to art. 142, at p. 832, *supra*. It is apprehended that art. 142 *does* apply to suits for possession of *interests* in immoveable property if the plaintiff was in possession of the same sometime *before* the dispossession or discontinuance of possession.

Interest in immoveable property.

It has been held that a suit to recover a right to an easement is a suit to recover an interest in immoveable property, and (when acquired otherwise than under sec. 26, Act XV) is governed by the twelve years' rule. (Kurupam *v.* Meranji, I. L. R., 5 Mad., 253. See also Mohun Deo Sarun *v.* Mahommed, 24 W. R., 300).

Easement.

Under Act IX of 1871 it was held that a right to the exclusive enjoyment of a julker (fishery) was an "interest in immoveable property." (Parbutty *v.* Madho, I. L. R., 3 Calc., 276). In Ram Gopal *v.* Nurimmudin, I. L. R., 20 Calc., 446. A julker right was held to

Fishery.

be immoveable property within the meaning of the General Clauses Act, I of 1868.

Easements and profits are immoveable property.

Art. 146 of Act IX of 1871 expressly provided for suits for declarations of rights to easements. No such article is to be found in Act XV of 1877. But though an easement is not a corporeal interest in land, it is an incorporeal hereditament savouring of reality, and as such, it is immoveable property or an interest in immoveable property. (See pp. 347, 363, 364 and 389, *supra*). It has been said that easements not amounting to profits *à prendre* are not "immoveable property" within the definition of that term in the General Clauses Act, I of 1868. (See Fadu *v.* Gour, I. L. R., 19 Calc., 544, at pp. 554, 559). But if easements are not "immoveable property," they must, according to that Act, be classed as "moveable property," a result which could never have been intended by the Legislature. (See pp. 205, 206, *supra*). As the technical division of property in the General Clauses Act is into moveables and immoveables, easements with other incorporeal hereditaments fall within the latter category. (See Maharana *v.* Desai, 21 W. R., 178, at p. 181, P. C.) They are at least "*interests* in immoveable property." (See the remarks of O'Kinealy, J., in Fadu *v.* Gour, I. L. R., 19 Calc., 544, 563). Obstructions to easements being continuing causes of action, neither art. 120 nor art. 144 will bar the suit if the easement is not extinguished. In Rajrup Koer *v.* Abul Hossain, I. L. R., 6 Calc., 394, at p. 402, their Lordships of the Privy Council remark that no provision of the Limitation Act interferes with the plaintiff's right to enforce an easement (acquired independently of the statute) even where the easement has been obstructed for more than two but less than twenty years. It may be here observed that even cl. 4 of sec. 26 is not a provision relating to *limitation* properly so called. (See p. 642, *supra*). As to the extinction of easements by non-enjoyment, see pp. 465-469, *supra*.

Obstructions to easements, *continuing* causes of action.

Buildings and trees.

"The superstructure of a building, *exclusive* of the land beneath," if intended to be dealt with as an existing house, is an interest in immoveable property. (Narayana *v.* Ramaswamy, 8 Mad., 100). A suit to recover possession of mango trees growing on plaintiffs' land, but the fruits of which are taken by the defendant adversely to the plaintiff, is a suit to which art. 142 or art. 144 may apply. (Babu *v.* Dhondi, I. L. R., 16 Bom., 353). As to the meaning of the term "immoveable property," see pp. 177, 178, 205, 389, 832, *supra*.

Certain declaratory suits are *virtually* suits for possession.

A suit by a person admittedly in possession as a tenant, for a declaration of his right to possession as proprietor, is substantially a suit for (proprietary) possession. (Debi Prosad *v.* Jafar, I. L. R., 3 All., 40). See the notes to art. 120, as to whether all declaratory suits in respect of immoveable property are governed by art. 144. As a person whose name has not been registered under the Land Registration Act in respect of an estate or revenue-free property in Bengal cannot enforce payments of rents by the tenants in occupation of such estate or property (sec. 78, Art. VII, B. C. of 1876), it has been held that a suit for a declaration of right to have the plaintiff's name so registered is substantially a suit for *possession* of immoveable property and governed by the twelve years' rule. (See Janki Prosad *v.* Jumna Prosad, second Appeal No. 1897 of 1893, decided by Prinsep and Ghose, JJ., in the beginning of April 1895). But the six years' rule has been applied to suits for declaration of right to registry in Madras and Bombay. (See pp. 767, 768, *supra*).

General articles.

The words "not hereby otherwise specially provided for" refer to suits for possession of immoveable property, and not to suits generally. (See Betts *v.* Mahomed, 25 W. R., 521, 523, cited at p. 754,

supra). Arts. 134 to 143, and art. 146, refer to suits for possession of immoveable property which have been *specially* provided for. Art. 144 is the most *general* article for suits for possession of immoveable property. For other *general* articles for *other* suits, see pp. 679, 691, *supra*. Art. 120 is the most general article for *suits generally*.

Suits governed by art. 144. See p. 841.

A suit by the mortgagee, for possession of the mortgaged property, against a person who subsequently purchased the property, *bonâ fide*, as an absolute property, from the *mortgagor*, will probably be governed by this article if not by art. 135. (See the notes to arts. 134, 135). If art. 135 applies (see Shurno Moyee *v.* Sreenath Das, I. L. R., 12 Calc., 614), it is not necessary to consider whether or not the possession of such a purchaser is adverse to the mortgagee. In Durga Prosad *v.* Shambhu Nath, I. L. R., 8 All., 86, it was held that if the purchaser did not acquire the property at an execution sale, if he acquired it by asserting a right of pre-emption against the mortgagor, his possession could not be adverse to the mortgagee, but in acknowledgment of all obligations created by the vendor. It was assumed that art. 144, and not art. 135, was applicable to the mortgagee's suit for possession against the mortgagor's alienees or assigns, and the question of notice was considered immaterial. So a suit by a landlord against a person who purchased the land from his tenant is governed by this article. (Compare art. 139 and see p. 142, *supra*). A suit against a person, who purchased the plaintiff's immoveable property, *bonâ fide*, and for a valuable consideration, from a person who is guilty of concealed fraud under sec. 18, is also "not specially provided for." (See p. 617, *supra*). Suits against trespassers on property mortgaged or leased will apparently fall within art. 144. (See Ramcoomar *v.* Prosonno, W. R., Gap No., p. 375; Krishna *v.* Hari, I. L. R., 9 Calc., 367). But see p. 806, *supra*. A suit by a mortgagee to enforce his lien under a simple mortgage against the mortgaged property is governed by this article, if the defendant has been in possession of it adversely to the mortgagor and the mortgagee. (Karansing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C.) In order that art. 144 may apply to a particular case, it is therefore not necessary (as held in Greender *v.* Mackintosh, I. L. R., 4 Calc., at p. 923, referred to in the notes to art. 120, at p. 766, *supra*), that the plaintiff should personally claim any right to possession. As to adverse possession in these cases, see pp. 140-154, *supra*. A suit to recover possession of land from a party who had been originally put into possession of it by the owner as a permissive occupant is governed by this article. (See Govind Lal *v.* Debendro Nath, I. L. R., 6 Calc., 311, and p. 831, *supra*).

Against *mortgagor's* alienees.

Tenant's alienee.

Purchaser in case of concealed fraud.

Trespasser on land mortgaged or leased.

Permissive occupants.

A zemindar's suit for *khas* possession against the holder of a permanent undertenure created by a trespasser who had been in possession of the zemindari, is governed by this article. (See pp. 134, 168 and 816, *supra*; Mohendro *v.* Nafar, 1 C. L. R., 531; Sankaran *v.* Periasami, I. L. R., 13 Mad., 467; Gosain *v.* Bepin, I. L. R., 18 Calc., 520).

Trespasser's putnidar.

But a mortgagee's suit for *khas* possession against the holder of a permanent tenure created by the mortgagor after the date of the mortgage is not affected by the possession of the tenure-holder. (See Kasummunissa *v.* Nilratan, I. L. R., 8 Calc., 79; p. 168, *supra*).

Mortgagor's putnidar.

A suit to recover possession of mortgaged property, as absolute owner after foreclosure under Bengal Regulation XVII of 1806, is governed by this article. (Modunmohun *v.* Ashad Ali, I. L. R., 10 Calc., 68). But it has been held that, where, by the express terms of the mortgage, the mortgagee has a right to take possession before

Possession after foreclosure under Beng. Reg.

the foreclosure, as, upon default in payment of the mortgage-money, art. 135 will apply, except where the plaintiff completed foreclosure proceedings within the twelve years allowed by that article. (*Ibid.*, I. L. R., 12 Calc., 614). See p. 808, *supra*.

Suit for share if partition is set aside.

Where lands have been partitioned by a private arrangement between two co-sharers, A and B, if the arrangement by which distinct plots are held by A and B in severalty is afterwards set aside at the instance of an execution-purchaser of the rights and interests of A in the whole of the lands, and such purchaser takes possession of A's undivided share of the whole, B's suit for his share of the specific plots, which had been allotted to A by such arrangement, is governed by this article. (Dewan Manwar Ali *v.* Annoda Prosad, I. L. R., 5 Calc., 644, P. C.) See pp. 109-111, *supra*.

Against vendor.

A suit for possession by the vendee against the vendor when the latter was in possession of the property at the time of sale is governed by art. 144. (Anand *v.* Ali, I. L. R., 11 Calc., 229; p. 811, *supra*).

A suit by a purchaser at a private sale for possession of immoveable property, when the vendor, though not in possession at the date of the sale, has since amicably recovered possession of the same is governed by this article. Time runs from the date the vendor recovered possession. (Ramprosad *v.* Lukhinarain, I. L. R., 12 Calc., 197; Syud Nyamtulla *v.* Nana, I. L. R., 13 Bom., 424, 428; Sheo Prosad *v.* Udai, I. L. R., 2 All., 718). See notes to art. 136, at p. 810, *supra*.

Ancestor's alleged grantee.

On A's death, his immoveable property was taken possession of by B under a deed of sale said to have been executed by A. A suit by A's heirs for recovery of the property from B is governed by this article. In a case of this sort, it cannot be alleged that A or his heirs were dispossessed by B within the meaning of art. 142. (See Trilochun *v.* Nobokishore, 2 C. L. R., 10).

Agreement to surrender.

A suit for possession of land, on an agreement (in a *ruffanamah*) to surrender possession is governed by this article. See notes to art. 113, at p. 753, *supra*.

Assignee against insolvent.

The possession of after-acquired property by an insolvent, who has not obtained his final discharge, is adverse to the official assignee and his vendee. (Kristo *v.* Suresh, 12 C. L. R., 253). A suit for possession by the assignee's vendee against the insolvent is governed by art. 144, and not by art. 142.

Plaintiff *v.* co-plaintiff dispossessing defendant.

A, B and C are dispossessed of immoveable property by D. A, B and C sue D (under art. 142), for recovery of possession and obtain a decree. While this suit is pending, A dispossesses D and takes exclusive possession of the property. A suit by B and C against their former co-plaintiff, A, for possession of their shares, is governed by art. 144. (Ramkishore *v.* Bandakaratan, I. L. R., 13 Calc., 243). See notes to art. 142, at p. 833, *supra*.

Setting up permanency of tenure.

This article has been applied to a suit by the proprietor against the holder of a sub-tenure, falsely setting up the permanency of the tenure. (See Ramchundra *v.* Madho, I. L. R., 12 Calc, 485, 493, P. C., and notes to arts. 139 and 140). See also pp. 134, 135, *supra*.

Heir of one of two co-tenants taking possession of whole.

Art. 144 has been applied to a suit by a purchaser of the rights of one of two co-tenants (not members of a joint family) against a person who took exclusive possession of the whole on the death of the other co-tenant and as his heir. (Ramlakshamma *v.* Ramanna, I. L. R., 9 Mad., 482, P. C.)

The plaintiff who was the sister of the defendant, sued in 1888 to recover from him a moiety of a *paramba* purchased by them jointly in 1859. In 1878 the plaintiff went to live elsewhere, but from time to time visited the house on the *paramba* for ceremonies and festivals, and spent a few days there with the defendant. *Held*, that this was not a case of dispossession or discontinuance of possession, that art. 144 applied to it, and that the *onus* was on the defendant to prove adverse possession for twelve years or more. (Alima *v.* Kutti, I. L. R., 14 Mad., 96). Case not amounting to discontinuance under art. 142.

A suit to recover immoveable property comprised in an order of the Magistrate respecting its possession is governed by art. 144, if art. 47 is for some reason or other inapplicable to it. (See Bolai *v.* Samiruddin, I. L. R., 19 Calc., 646, and p. 687, *supra*). A decree for specific performance of an agreement for lease must be executed, and the lease actually signed before the possession of the land by a subsequent grantee of the lessor becomes adverse to the lessee. (*Ibid.*) A suit to recover immoveable property *as heir* of the deceased owner is governed by art. 144, if art. 123 be inapplicable to it. (See pp. 775, 776, *supra*). A suit to recover possession of lands demised by the plaintiff, but of which the plaintiff's lessee has, during the continuance of the lease, been dispossessed by a *third* person (not falling under art. 139) is governed by art. 144. (See Krishna *v.* Hari, I. L. R., 9 Calc., 367, and pp. 143-145 ; 815, *supra*). Similarly suits for possession of immoveable property not falling under any other *specific* article is governed by this *general* article. See also notes to arts. 91, 92, arts. 134-141 and arts. 146-148 for other cases in which those articles not applying art. 144 was considered to be applicable. See also Kartik *v.* Saroda, I. L. R., 18 Calc., 642, at p. 646. Under art. 142 it is *not* necessary to consider when defendant's possession becomes *adverse* to plaintiff. (See pp. 830, 831, *supra*). *Otherwise*, under art. 144. The possession of any person from or through whom a defendant derives his liability to be sued is also the possession of the defendant. (*Vide* sec. 3). A son validly adopted by the senior Hindu widow claims through the adoptive father, but he may derive his liability to be sued from his adoptive mother, if she being in adverse possession against the plaintiff (who had been three years before invalidly adopted by a junior widow) put him into possession on the date of the adoption. The adoptive mother's possession before the adoption, being adverse to the plaintiff, such possession of the mother may, under these circumstances, be tacked on to the son's own adverse possession (against the plaintiff) since the adoption. (Padajirav *v.* Ramrav, I. L. R., 13 Bom., 160). Possession properly taken by Government for the enforcement of a revenue demand is not adverse to the true owner, even although payments of surplus-proceeds are made to the defendant. Such possession is like the possession of a stake-holder who holds the property for the real owner, whoever he may be. The defendant, in such a case, is not entitled to add to the period during which he has himself been in possession, the period during which the Government was in such possession : 1*st*, because the possession of Government was not adverse to the plaintiff ; and, *secondly*, because the defendant does not derive his liability to be sued from or through the Government. (Karan Singh *v.* Bakar Ali, I. L. R., 5 All., 1, P. C.) This case is referred to and explained in Gopal *v.* Nilmoney, I. L. R., 10 Calc., 74, 378 ; and Gopinath *v.* Bhugwat, I. L. R., 10 Calc., 697, 708. See also p. 170, *supra*, and notes to art. 141.

Art. 144 applies where *other* articles do not. See p. 839.

Defendant's possession becoming *adverse* to plaintiff.

Tacking possession.

Possession of stake holder not adverse.

Where, in consequence of dissensions in the family of the real owners, Government attaches their lands and holds the same as their

Attachment by Govt.

Poss. before release of attachment, not adverse.

guardian or bailiff, and does not restore the lands to the real owners, until sixty or seventy years after the date of attachment, a suit by the real owners against a person who entered into possession as a tenant of the Government, is not barred by limitation if brought within twelve years from the date of the restoration. The plaintiffs would be excused by all legal principles from having taken any legal steps in the meantime, not only on the ground of their individual rights being in suspense—in *custodia legis* in a particular sense—but because they could not act or sue—the inability of the plaintiffs to bring their suit earlier falling within the purview of the maxim *contra non valentem agere non currit præscriptio.* (Tukaram *v.* Sujangir, I. L. R., 8 Bom., 585).

Poss. of part. *Quasi*-possession.

As to when possession of a part is possession of the whole, see p. 123. As to when the enjoyment of any right of ownership amounts to possession as opposed to *quasi*-possession, see p. 122, *supra.*

Tenant's encroachments.

As to encroachments by tenants on the adjoining lands of their landlords, see pp. 137-139, *supra.*

Possession of *limited* interest.

As to what constitutes adverse possession, see *supra*, pp. 127 *et seq.* Possession of a *limited* interest in immoveable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest, as is adverse possession of a *complete* interest in the property to bar a suit for the *whole* of the proprietary rights. (See Sankaran *v.* Periasami, I. L. R., 13 Mad., 467, and pp. 130, 131, *supra*). In order that the possession of one person may be adverse to another the *same sort* of possession (full proprietary or otherwise) must be claimed by the contending parties. The defendant's adverse possession must be of the *same kind* as the possession claimed by the plaintiff. The defendant must prove hostile possession of the *very right* which the plaintiff claims. (Umrunnissa *v.* Mahammed, I. L. R., 3 All., 24, F. B., and pp. 131, 151, *supra*).

Manager and priests of temple.

The hereditary manager and trustee of a temple holds the temple property for the idol of the temple. The *shevoks* or priests of the idol come in as servants or representatives of and hold for the same idol. In that ideal personage, the two rights—that of the manager and that of the *shevoks*—concur, and one cannot, therefore, really be adverse to the other so as to give rise to a title by prescription. (Mulji *v.* Manohor, I. L. R., 12 Bom., 322-324).

Sale by absent owner's wife.

If a Hindu woman whose husband has not been heard of for some years sells his lands in his absence and without any authority from him, and the purchaser enters into possession thereof, the husband cannot, on returning home, eject the purchaser, unless a suit under this article is brought within twelve years of the date when the purchaser entered into possession. (Bejoy *v.* Kally, I. L. R., 4 Calc., 327).

Redemption by one of two co-mortgagors.

The redemption of a mortgage by one of two mortgagors creates in his favor only a charge on the share of his co-mortgagor in the property mortgaged, for his proportion of the mortgage debt, and the expenses incurred in redeeming and obtaining possession of the mortgaged property. The possession arising from such redemption is referable to the first mortgage, so far as the co-mortgagor's interest in the property is concerned, in the absence of distinct evidence to show that it was acquired or retained with the assertion of an adverse title. Moidin *v.* Oothuman, I. L. R., 11 Mad., 416. (See also Ramchander *v.* Sadashiv, I. L. R., 11 Bom., 422 ; and p. 151, *supra*).

Possession of co-lessor, not adverse, if lessee did not pay any rent.

Where A, the ostensible owner of the whole of a certain property, holding a 4-annas share of it for himself, and a 12-annas share for B, had given a lease of the property to C, in a suit between the assignee of A's heirs and the assignee of B, in respect of the 4-annas share of A, the question of adverse possession raised by B's assignee must be decided with reference to the actual receipt of rent from the tenant C. If the tenant C did not pay any rent either to A's heirs or to B, there could be no adverse possession against A's heirs or their assignee. (Immambandi *v.* Kumlaswari, I. L. R., 14 Calc., 109, P. C.)

Vendor's possession adverse from date of transfer.

In the case of a sale out and out, if the vendor remain in possession, his possession is adverse to the purchaser from the date of the transfer of the properties, *viz.*, from the date of the execution of the conveyance. The commencement of the adverse possession is not deferred until the registration of the document. (Anandcoomari *v.* Alli Jamin, I. L. R., 11 Calc., 229 ; Tew *v.* Jones, 13 M. and W., 12 ; Sayad Nyamtula *v.* Nana, I. L. R., 13 Bom., 424, 428). See notes to art. 136. But where a transfer cannot be effected except by a registered instrument, there is *no transfer* before the registration (see sec. 54, Act IV of 1882). If B purchases the rights and interests of A, (a vendor of lands who continues to be in possession of the same, notwithstanding his sale to C) and B obtains possession from A, in a suit for possession by C against B, B may tack his own possession since his own purchase, to A's possession of the lands since his sale to C. (Woomachurn *v.* Ranee Mohamoya, Gap No., W. R., 130 ; pp. 167, 168, *supra*).

Tacking of possession.

Independent trespassers can *not* tack.

The periods of possession of successive and independent trespassers cannot be added to make up the twelve years required by this article ; for the last of them, against whom the suit is brought, does not derive his liability to be sued from or through any of the preceding trespassers. (See pp. 168, 169, 334, *supra*). It is *practically* otherwise if the plaintiff is *continuously* out of possession. See p. 833, *supra*.

Onus of proof under art. 144.

In a suit falling under art. 144, *not* being a suit for possession as upon a dispossession under art. 142, it is not necessary for the plaintiff to prove that he was in possession within the period of twelve years. He was subject to a heavier *onus* under Act XIV of 1859, which required the suit to be brought within twelve years of the plaintiff's cause of action. (Karan Sing *v.* Bakar Ali, I. L. R., 5 All., 1, P. C. ; I. L. R., 10 Calc., 374, 379). If the plaintiff's suit is not *primâ facie* barred by limitation, (see Parmanund *v.* Sahib, I. L. R., 11 All., 438 ; Isfar *v.* Mashuq, I. L. R., 14 All., 194, and pp. 92 *et seq.*, *supra*), it lies on the defendant to prove an adverse possession for twelve years in order to establish his defence under this article. (See I. L. R., 10 Calc., 374, 379 ; Sayad Nyamtula *v.* Nana, I. L. R., 13 Bom., 424 ; Faki *v.* Babaji, I. L. R., 14 Bom., 458 ; Hanmanta *v.* Mahadev, I. L. R., 18 Bom., 513, at p. 515). As to the question of *onus* in cases under art. 144, see also pp. 109, 110, *supra*.

Under art. 142.

In a suit for possession as upon a dispossession, under art. 142, even if the plaintiff proves his superior title, he must show that that title has not been extinguished by limitation. The plaintiff must prove that he was in possession within twelve years of the institution of the suit, even as against ryots who have subsequently attroned to the principal defendant. (Mohim Chunder *v.* Mohesh Chunder, I. L. R., 16 Calc., 473). Their Lordships of the Privy Council have in this case practically adopted Sir Richard Garth's explanation of the ruling in Karan Singh's case. (See Gopal *v.* Nilmoney, I. L. R., 10 Calc., 374, 378 ; and pp. 98, 109, 170, *supra*).]

Part IX.—Thirty years.

Art. 145.	145.—Against a depositary or pawnee to recover moveable property deposited or pawned.	Thirty years ...	The date of the deposit or pawn.

[No. 145. (No. 147, Act IX; sec. 1, cl. 15, Act XIV).

Old law. Before 1862, suits against depositaries or mortgagees for recovery of property deposited or mortgaged, were not barred by any limitation. (See pp. 42, 43, *supra*, and notes to art. 148). According to English and American cases neither prescription nor limitation will run in favor of the possession of the pledgee. Buswell, p. 200; Kemp *v.* Westbrook, 1 Ves., 278.

Acknowledgments. As to acknowledgments of the title of the depositor or pawner or of his right of redemption, see sec. 19, and pp. 275-278, *supra*.

Depositary and pawnee. A depositary is a person holding possession of moveable property originally delivered to him to be kept for the owner. A pawnee is a person to whom such property is delivered in pledge as security for a debt. A mortgage of chattels passes the whole title. A pledge passes a special property. In hypotheca, the dominion or legal estate passes to the creditor, but the usufruct or use remains with the debtor. (Shephard and Brown's Transfer of Property Act, 3rd Ed., p. 179). A pledgee is only entitled to an order for sale, while a mortgagee is ordinarily entitled to an order for foreclosure.—Ghose's Law of Mortgage, 2nd Ed., p. 358.

Redemption of pledge. A suit for redemption of a pledge is governed by art. 145. (Kashiram *v.* Hiraman, I. L. R., 15 Bom., 30, at p. 32).

Art. 60. Suits for money deposited under an agreement that it shall be payable on demand are governed by art. 60. Art. 145 applies to deposits recoverable *in specie*. (Parbutty *v.* Ramnarain, 16 W. R., 164, note; Radhanath *v.* Bama Churn, 25 W. R., 415).

Recoverable *in specie*. Moveable property *deposited* within the meaning of art. 133 as well as of art. 145 is recoverable *in specie*. (Ishur *v.* Jibun, I. L. R., 16 Calc., 25, at p. 29). Art. 145 is inapplicable to a claim for money where it was never intended that the specific coins deposited should be returned. (Jasoda *v.* Parmanand, I. L. R., 16 All., 256, at p. 258).

Surplus sale-proceeds and other balances with Collector. As to suits for money held in deposit by the Collector under sec. 31 of Act XI of 1859, see Secretary of State *v.* Abdul Bari, I. L. R., 20 Calc., 51, F. B., cited at pp. 700, 771, *supra*.

The balance of monies paid to the Collector, to meet uncertain sums due for Government revenue, subject to an adjustment when the share of the revenue, for which the plaintiff is responsible, shall be ascertained, is not a deposit, and the Collector in such a case is not a depositary. (Gobind *v.* Collector, 11 W. R., 491). In some cases the Collector has been treated as a depositary of *malikana* allowances payable by him to the malik who refused to take a settlement. (See Government *v.* Bhoopnarain, 2 W. R., 162; Govind *v.* Ram Chunder, 19 W. R., 94, at p. 95). Payments made in *excess* of an agreement to pay by instalments are not deposits within the meaning of this article. (Radhanath *v.* Bamachurn, 25 W. R., 414).

Overpayments.

Security deposit. A suit to recover a sum of money deposited as security for the proper performance of the duties of an office, and from which the employer was entitled to deduct all sums not accounted for by the employé, comes under art. 120. It may be, and authority is not

wanting for this view, that the amount is a deposit which comes under art. 145. (Upendro Lal *v.* Collector, I. L. R., 12 Calc., 113). But the better opinion appears to be that if the deposit is not recoverable *in specie*, art. 145 is inapplicable.

A suit against a person, *other* than the depositary or pawnee, is not governed by this article. A suit against a person, who has bought the property (for a valuable consideration) from the depositary or pawnee, is governed by art. 133.

Under this article time runs from the date of the deposit or pawn, not from the date when the property is to be returned or the debt to be paid. (See p. 261, *supra*). But where there is an express stipulation that the property is to be returned or the debt is to be paid, after 30 years, it may be contended that a limitation of 30 years, which runs from the *date* of the deposit or pawn is inapplicable. See, however, the remarks of the Privy Council in Luchmee Bux *v.* Runjeet Ram (20 W. R., 375, 376), and compare art. 148.] Starting point of limitation.

146.—Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.	Thirty years ...	When any part of the principal or interest was last paid on account of the mortgage-debt.	Art. 146.

[No. 146. (No. 149, Act IX ; sec. 6, Act XIV).

See the notes to art. 135 which provides for similar suits in the mofussil.

This article does not apply when the defendant is a person other than the mortgagor. A person who represents the mortgagor and merely claims the equity of redemption is, of course, bound by this article. In England, under 7 Will. and 1 Vict., c. 28, even where a *third* party is in adverse possession, payment of interest by the mortgagor saves the mortgagee's suit for possession. See pp. 149, 153, *supra*. Art. 146 applies to suits against mortgagors, and their representatives.

Art. 135 does not expressly state against whom the suit under that article must be brought. According to Pigot and O'Kinealy, JJ., the suit contemplated by art. 135 is a suit against the mortgagor himself or any body else. (Shurnomoyee *v.* Srinath Das, I. L. R., 12 Calc., 614, at p. 620). Art. 135.

Under Act XIV the period of limitation was 12 years ; under Act IX it was 60 years ; under this Act it is 30 years. Comparing the provisions of arts. 135 and 146, it may be plausibly argued that a *payment*, on account of the mortgage-debt, does not in cases falling under art. 135 give the mortgagee a fresh start. But the exceptional provisions of art. 146 may have been introduced in order to put mortgages in the English form when put in suit in a Court established by Royal Charter, upon (nearly) the same footing as that in which English mortgages are under 7 Will. and 1 Vict., c. 28. It does not, therefore, follow that in the simple case of a mortgagee, and his mortgagor permitted to remain in possession so long as he paid interest (or any part of the principal), a fresh right to sue does not accrue, to the mortgagee under art. 135, when that permission ceases, and the mortgagor's right to possession is determined. (See Brojonauth Koondoo *v.* Khelut Chunder, 16 W. R., P. C., 33 ; and Does payment give fresh right to sue under art. 135 ?

p. 807, *supra*). As to a possible reason for allowing the mortgagee a longer period than 12 years in cases of payments, under art. 146, see Ramchunder *v.* Juggutmonmohinee, I. L. R., 4 Calc., 283. See also pp. 153 and 322, *supra*. It may be here observed that the application of the English statute is not limited to suits to recover possession from the mortgagor; and that payment does not entitle an English mortgagee to a period longer than the ordinary period.

Case of *no* payment under art. 146.

The 12 years' limitation (under art. 144) will still apply where there has been no payment on account of the mortgage-debt. (Ramchunder *v.* Juggutmonmohinee, I. L. R., 4 Calc., 283). The twelve years are to be computed from the time when the mortgagor's right to possession ceases, *i.e.*, generally when default is made in payment of the debt on the due date.

What is a good payment.

The words "paid on account of the mortgage-debt" mean paid by any person liable to pay the mortgage-debt. A payment by an utter *stranger* is not sufficient. Payment by a receiver, who is bound to pay on behalf of the mortgagor is, but a payment of rent by a tenant on a requisition by the mortgagee, is not sufficient. (Harlock *v.* Ashberry, 19 Ch. Div., 539). See pp. 313, 318, 319, *supra*. Payment made by the mortgagor's solicitor professedly for the mortgagor may not be sufficient, if it appears that the mortgagor did not make any payment whatever to the solicitor. (Newhould *v.* Smith, 29 Ch. Div., 882; 33 Ch. Div., 127; Ghose, 2nd Ed., p. 524). In the absence of any notice of the assignment of a mortgage, the mortgagor may pay the mortgage-debt to the original mortgagee, and any payment so made is a good payment as against the assignee. (*In re* Lord Southampton's estate, 16 Ch. Div., 178; Ghose, 2nd Ed., p. 513). If a usufructuary mortgagee or a mortgagee in any other form, in possession of the mortgaged property, receives the produce of such land, such receipt operates as a payment under sec. 20 of Act XV. But it is apprehended that sec. 20 does not apply to a suit for possession under art. 146. (See note 10, p. 312, *supra*).

Interest *post diem*.

Even where there is no covenant for payment of interest subsequent to the date on which the principal sum is payable, payment at the rate fixed, made after the due date, is payment of interest within the meaning of the Act.

Payment by surety.

Part payment or payment of interest by a surety of the principal debtor may under this article give the mortgagee a fresh start against the mortgagor. In suits under this article, payments give a new start, independently of secs. 20 and 21. (See Allison *v.* Frishby, 43 Ch. Div., 106, and note 2, p. 314, *supra*). Payment by *any* person *liable* to pay, *e.g.*, a surety of the mortgagor is a payment from which the period of limitation is to be counted under this article. (See 43 Ch. D., 106, at p. 116).]

Part X.—Sixty years.

Art. 147.	147.—By a mortgagee for foreclosure or sale.	Sixty years ...	When the money secured by the mortgage becomes due.

[No. 147. (No corresponding article in Act IX or Act XIV).

Foreclosure under repealed Bengal Regulation.

Before the Transfer of Property Act, 1882, the mortgagee, under the Bengal Regulations (I of 1798 and XVII of 1806), had to apply to the District Judge to issue a notice of foreclosure on the mortgagor, or his representatives, and if the mortgage-debt was not paid off within a year of the service of such notice, the mortgage was foreclosed. There was no limitation applicable to such an *application*. (See Dinonath *v.* Nursing, 22 W. R., 90, at p. 94; Buldeen *v.* Golab, Agra, F. B., 102, 3rd June 1867). It may be here observed that the Regulations

referred to are still in force in the Punjab, the Sonthal Pergunnahs, and possibly in Chota Nagpore. (See p. 810, *supra*). An *application* for the foreclosure of a *kat kabala* or a mortgage by conditional sale in these provinces is not governed by art. 178 of Act XV. (See pp. 236, 557, *supra*). The Regulation being still in force in the Punjab and other districts, mortgagees in those parts of the country cannot bring a regular suit for foreclosure, and according to Pigot and O'Kinealy, JJ., the law of limitation applicable to suits for possession by such mortgagees would be that given in art. 135. (Shurnomoyee *v.* Srinath Dass, I. L. R., 12 Calc., 614). If the mortgage deed expressly provides that the mortgagee shall be entitled to possession (on default of payment on the due date, or otherwise) *before* foreclosure, the mortgagee must complete, or, at least, commence the foreclosure proceedings before the end of the twelve years prescribed by art. 135. Where there is no express stipulation for such possession, the mortgagee may bring his suit for possession as absolute owner, under art. 144, although the foreclosure proceedings in the District Judge's office were not commenced or completed within twelve years of the date of default. (Muddun Mohun *v.* Ashad, I. L. R., 10 Calc., 68). See the notes to art. 135, at p. 808, *supra*.

Limitation where Beng. Reg. is still in force.

No period of limitation was expressly prescribed by Act XIV of 1859 for a suit for money secured by a mortgage or otherwise charged upon immoveable property, nor for a suit for possession, or for foreclosure by a mortgagee. Act IX of 1871 provided for the first two cases, but was entirely silent as regards suits for foreclosure. In the absence of an express provision on the subject, a suit for foreclosure is treated by some as a suit for "money charged upon immoveable property," and by others, as a suit for possession of immoveable property mortgaged" (see Dearman *v.* Wyche, 9 Sim., 570; Wrixon *v.* Vize, 3 Dru. and War., 104; Darby and Bosanquet, 115). See also Nilcomal *v.* Kamini, I. L. R., 20 Calc., 269, in which art. 132 or art. 135 was considered applicable to suits for foreclosure of mortgages *not falling* under art. 147 of Act XV of 1877.

Foreclosure suits under Acts XIV and IX.

A suit to foreclose an English mortgage or to enforce an equitable mortgage, in a Court established by Royal Charter, was, under Act XIV of 1859, governed by the twelve years' rule under sec. 1, cl. 12. (See Ganput *v.* Adarji, I. L. R., 3 Bom., 312, 331; Khemji *v.* Rama, I. L. R., 10 Bom., 519, 524). Under Act IX, such a suit might be treated as a suit for the enforcement of a charge under art. 132, or as a suit for possession of mortgaged property under art. 149 of that Act. (*Ibid.*) According to the Calcutta High Court, the twelve years' rule applied to a suit for foreclosure under Act XIV as well as under Act IX. (Ramchunder *v.* Juggutmonmohinee, I. L. R., 4 Calc., 283, 302, 303). Suits for foreclosure were (before the Transfer of Property Act) unknown in the mofussil of the Presidency of Bengal. They are still unknown in the Punjab, where Bengal Regulation, XVII of 1806, is still in force. Suits for foreclosure in the mofussil of the Presidency of Bombay and the Presidency of Madras, when allowed, were governed by sec. 1, cl. 12, Act XIV of 1859, and by art. 132 or art. 135 of Act IX of 1871.

The right to foreclosure is, in the absence of any stipulation, generally co-extensive with the right to redeem (see Vadju *v.* Vadju, I. L. R., 5 Bom., 22; but cf. Bhugwat *v.* Pershad, I. L. R., 10 All., 602, 607). For an exception, see Babaji *v.* Vithu, I. L. R., 6 Bom., 734, where it was held that a mortgagor, under the Dekkan Agriculturist's Relief Act, may redeem *before* the time fixed for payment of the mortgage-debt. The same period of limitation should be

Foreclosure and redemption co-extensive.

prescribed for suits for foreclosure and suits for redemption. Act XV expressly allows 60 years in both cases.

Foreclosure and possession.

In England, although a decree for foreclosure may provide for possession, it need not necessarily do so. (Withall *v.* Nixon, 28 Ch. Div., 413). And under sec. 87 of the Transfer of Property Act, it is not absolutely necessary to ask for possession in a foreclosure suit. (Ghose, 2nd Ed., p. 490). Within twelve years of the order absolute for foreclosure, the mortgagee may bring a suit to recover possession of the land as absolute owner thereof. (See Pugh *v.* Heath, 7 App. Cas., 235, and the notes to art. 135).

Simple mortgage.

As to whether a suit on a simple mortgage (executed before or after the Transfer of Property Act, 1882, came into operation) to enforce the payment of the mortgage-money by a sale of the mortgaged property, is governed by this article, or by art. 132, see Shiblall *v.* Ganga, I. L. R., 6 All., 551, F. B. ; Motiram *v.* Vitai, I. L. R., 13 Bom., 90, F. B. ; Rongasami *v.* Mutukumarappa, I. L. R., 10 Mad., 509, F. B. ; Girwar Sing *v.* Thakur Narain, I. L. R., 14 Calc., 730, F. B., and pp. 794-799, *supra*.

Where terms do not amount to charge or mortgage.

Where the terms of a bond really come to no more than this, that if the money advanced is not paid upon the due date, the obligee will be entitled by due process of law to recover the amount of the debt from *any* moveable and immoveable property of the debtor, no charge or mortgage is created thereby, and art. 132 or art. 147 is not applicable to a suit for recovery of the debt on such a bond. (Collector *v.* Beti, I. L. R., 14 All., 162, and p. 799, *supra*). As to what mortgagees are entitled to sue, for foreclosure or sale, see p. 794, *supra*.

Adverse holders.

If the mortgaged property is in the possession of a person who claims to hold the property as his absolute property, adversely to the mortgagor and mortgagee, the mortgagee's suit will be governed by art. 144. (See p. 153, *supra* ; Prosunna *v.* Ramkumar, W. R., Gap No., 1864, p. 375 ; Ammu *v.* Ramkrishna, I. L. R., 2 Mad., 226 ; Chinto *v.* Janki, I. L. R., 18 Bom., 51). In one case it was said that art. 135 might apply to *all* suits for possession against the mortgagor or parties in possession of the mortgaged property. (See I. L. R., 12 Calc., at p. 630, and p. 806, *supra*). A suit against such a person who claims to hold the property adversely to the mortgagor and the mortgagee, is not a suit for foreclosure of the mortgage, but a suit for possession of the property. As to the effect of a foreclosure, see pp. 807-808, *supra*.

Foreclosure *suits* in the Bengal Presidency.

The question whether on the Transfer of Property Act coming into operation on the 1st of July 1882, art. 147 of Act XV of 1877 immediately fastened on suits for foreclosure in Bengal and the other Provinces was raised, but not decided by their Lordships of the Privy Council in Srinath Dass *v.* Khetter Mohun Singh, I. L. R., 16 Calc., 643, P. C. This case was disposed of on other grounds on the 5th February 1889. See p. 809, *supra*.

To what mortgagees is art. 147 applicable.

According to the ruling of the Full Bench in I. L. R., 14 Calc., 730, art. 147 is not applicable to any mortgage by conditional sale whether such mortgage is executed before or after the repeal of Regulation XVII of 1806. Such a mortgagee is not entitled to sue for foreclosure *or* sale in the alternative. He can sue for foreclosure only. But according to F. B. rulings of the other High Courts the word "or" which precedes the word "sale" in art. 147 is to be read in its ordinary distributive sense, and a suit for the foreclosure of a conditional sale is therefore not excluded from the operation of that article. (See Shiblall *v.* Ganga Prosad, I. L. R., 6 All., 551 ; Rangasami *v.* Mutukumrappa, I. L. R., 10 Mad., 509 ; Motiram *v.* Vitai, I. L. R., 13 Bom., 90). Reading art. 147 with art. 132 it is apprehended that a charge (see pp. 792 and 798, *supra*), howsoever created, is not a mortgage

within the meaning of art. 147; and that English mortgages as well as mortgages by conditional sale are mortgages within the meaning of that article. (See p. 798, *supra*). The question whether art. 147 fastened on suits for foreclosure as soon as the Transfer of Property Act introduced such suits in the mofussil of the Bengal Presidency, has been answered in the affirmative in the Central Provinces, in a case in which default was made in November 1873, and *no* proceedings were taken under the repealed Bengal Regulation. (See Jagomohun *v.* Chaitu, 8 Cent. Prov. L. R., 65). In this case both Act XV of 1877 and Act IV of 1882 came into force before plaintiff's right to sue had become barred by limitation. The old procedure by which a mortgagee by conditional sale could (foreclose and) obtain possession of the mortgage property was abrogated; and the only course left to the plaintiff was a *suit* for foreclosure under Act IV of 1882. Where the plaintiff's right to sue had been barred under art. 135, *before* the Transfer of Property Act came into operation, he could not of course avail himself of the new remedy, or claim the benefit of art. 147. (See the notes to art. 135, and Murat Sing *v.* Ramlal, 8 Cent. Prov. L. R., 83). According to Pigot and Bannerji, JJ., art. 147 does not apply to *suits* for *foreclosure* (even under the Transfer of Property Act) of *conditional* sales in Bengal, because the Calcutta Full Bench case of Girwar Singh makes art. 147 applicable to English mortgages only. (See Nilcomal *v.* Kamini, I. L. R., 20 Calc., 269). But it has been held by O'Kinealy and Ameer Ali, JJ., in an unreported case (Mis. App. No. 343 of 1889, decided on the 18th August 1890) that where the right to foreclose a conditional sale under the Bengal Regulations had not ceased when the Transfer of Property Act came into operation, a suit by the conditional vendee or mortgagee for foreclosure under the Transfer of Property Act is governed by the sixty years' rule under art. 147. This ruling, though it is inconsistent with the reasons given by the Full Bench for their decision in the case of Girwar Sing *v.* Thakur Narain, I. L. R., 14 Calc., 731, is not opposed to the actual decision in that case. The High Courts of Madras, Bombay and Allahabad have refused to adopt the interpretation put upon art. 147 by the Full Bench of the Calcutta High Court. And it would certainly be inequitable to allow the mortgagee (in a conditional sale) twelve years only to foreclose the mortgage, while the mortgagor is undoubtedly entitled to sixty years (under art. 148) to redeem the same. Art. 147 has been applied in Madras to suits for foreclosure of conditional sales. (See Amanna *v.* Gurumarthi, I. L. R., 16 Mad., 64). A pure usufructuary mortgagee cannot sue either for foreclosure or for sale. Art. 147 does not, therefore, apply to such a mortgage. A simple mortgagee or hypothecatee may sue for sale, but as his case is separately provided for by art. 132, art. 147 is not applicable to his suit for a sale of the property over which he holds a charge (see pp. 792-799, *supra*). No distinction was drawn between a mortgage and a charge in any legislative enactment at the date of the passing of Act XV of 1877, and for the purposes of the Limitation Acts of 1859 and 1871, it was not necessary to distinguish a charge from a mortgage. The Limitation Act of 1877 makes distinct provisions for suits to enforce a charge by sale, and suits to enforce a mortgage by foreclosure or sale. The distinction between a mortgage and a charge drawn by Indian lawyers and Indian Judges for purposes of limitation or for other purposes, at or before the time when Act XV of 1877 was passed, should be referred to in interpreting these distinct provisions, *viz.*, arts. 132 and 147 of that Act. (See the judgments of Kernan and Brandt, JJ., in Rangasami *v.* Muttukumarappa, I. L. R., 10 Mad.,

Art. 147 applied to conditional sale in the Central Provinces.

Calc. High Court rulings.

Madras.

"Charge" and "mortgage" in 1877.

Hypothecation bonds in Madras and Bombay.

509; and p. 798, *supra*). In Bombay all ordinary hypothecation bonds are treated as mortgages within the meaning of art. 147. (Venkatish *v.* Narayan, I. L. R., 15 Bom., 183). And art. 132 is applied only to charges created by operation of *law*. (See p. 796, *supra*). In Madras a distinction is made between hypothecation bonds executed *before*, and those executed *after* the Transfer of Property Act, 1882, came into operation. (See pp. 792, 796, *supra*).

Punjab.

According to the latest decision of the Punjab Chief Court, a suit by a *simple* mortgagee to recover the mortgage money by sale of the mortgaged property is governed by art. 132. (Ramsaran Das *v.* Mahatab, Punj. Rec. No. 112 of 1890).

Act IV of 1882.

It may be added that, according to the Calcutta High Court, a mortgagee, who did not change his position by completing the foreclosure proceedings under Regulation XVII of 1806 before the 1st July 1882, is not only at liberty, but bound to adopt the procedure introduced by the Transfer of Property Act. (Bhobosundari *v.* Rakhal, I. L. R., 12 Calc., 583; Baij Nath *v.* Moheswari, I. L. R., 14 Calc., 451). The adoption of the new procedure will, however, be of no use if the mortgagee's right to possession has been already extinguished by art. 135 (see pp. 808, 809, *supra*). But see a Madras ruling cited at p. 809, *supra*. According to Pigot and Bannerji, JJ., even when the right to possession has not been extinguished, a suit for foreclosure of a *conditional sale* in Bengal, under the Transfer of Property Act, is governed either by art. 132 or by art. 135. (Nilcomal *v.* Kamini, I. L. R., 20 Calc., 269).]

Art. 148.	148.—Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years ...	When the right to redeem or to recover possession accrues. Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burmah, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.

[No. 148. (No. 148, Act IX; sec. 1, cl. 15, Act XIV).

See notes to arts. 132, 135, 145 and 147.

Law before 1859.

Before the enactment of cl. 15, sec. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgages. (See Daia *v.* Sarfraz, I. L. R., 1 All., 425, 427). But if a *bonâ fide* possessor held the property as owner for the prescribed period, the mortgagor could not recover the property from him. (See pp. 42, 44 and 46, *supra*).

For suits against a mortgagee of immoveable property for the *recovery* of the same, Act XIV of 1859 prescribed a limitation of sixty years from the *date* of the mortgage. A suit even against a usufructuary mortgagee was barred after sixty years from the date of the mortgage. (See Luchmeebux *v.* Runjeet, 20 W. R., 375, P. C., and p. 190, *supra*). A suit by a simple mortgagor to redeem the mortgage, the mortgagee not being in possession, was not governed by this provision. Suits to redeem simple mortgages were unnecessary, and therefore unknown. (Girwar Sing *v.* Thakur Narain, I. L. R., 14 Calc., 730, F. B.) But the Transfer of Property Act (IV of 1882) gives *all* mortgagors the right to sue for redemption. As to what are simple mortgages under the Act, see notes to art. 132. Acts XIV and IX. Redemption since 1882.

Act IX of 1871 re-enacted the same rule in very nearly the same words with a proviso in favor of certain mortgages in British Burmah. Act XV of 1877 speaks of suits for *redemption* as well as of suits to *recover* possession of immoveable property mortgaged. And the period of sixty years, under this Act, runs, not from the date of the mortgage, but from the time when the right to redeem or to recover possession accrues. In the case of a usufructuary mortgage where the mortgagee has a right to hold the land mortgaged until the mortgage debt is paid off, the right to redeem or to recover possession does not accrue until the debt is *satisfied*. The Privy Council case of Luchmeebux *v.* Runjeet is no longer applicable to such usufructuary mortgages. As to when the right accrues, see secs. 60-62 of the Transfer of Property Act. Even where the mortgage money is "repayable *within* ten years," or "repayable *in* ten years," the right to foreclose, and consequently the right to redeem, does not accrue until *after* the expiry of ten years. (Vadju *v.* Vadju, I. L. R., 5 Bom., 22 ; Raghubar *v.* Budhulal, I. L. R., 8 All., 95). A written acknowledgment of the right of the mortgagor gives a fresh start under sec. 19. (See pp. 275, 278, *supra*). Act XV. Repayable "in" or "within" ten years.

According to Westropp, C. J., (Vadju *v.* Vadju, I. L. R., 5 Bom., 22), the term fixed for paying off the mortgage debt is as binding upon the mortgagee as upon the mortgagor, unless the mortgagee can clearly show the contrary. But according to Turner, C. J., (Rajah Setrucherla *v.* Rajah Vairicherla, I. L. R., 2 Mad., 314), and Mahmud, J., (Bhagwat *v.* Parshad, I. L. R., 10 All., 602), the mortgage is redeemable at any time, unless the mortgagee can show from the fact of the mortgage being an usufructuary one, or from other circumstances that redemption should not be allowed before the expiry of the term mentioned in the mortgage deed. Under the Dekhan Agriculturists' Relief Act, XVII of 1879, the mortgagor may redeem *before* the expiry of the term. (Babajee *v.* Vithu, I. L. R., 6 Bom., 734). Onus of proof of accrual of right to redeem.

This article applies so long as the relation of the parties is not changed by foreclosure or otherwise. If the right of redemption is extinguished by foreclosure, the mortgagor's suit is not a suit for redemption or for recovery of property mortgaged. Where foreclosure proceedings under the Bengal Regulation were completed by the expiration of the year of grace, the mortgagor was held to be barred, if he did not sue to open up the foreclosure within twelve years. (See Lotf Hossein *v.* Abdool Ali, 8 W. R., 476 ; Burmamoyi *v.* Dinobundhoo, I. L. R., 6 Calc., 564, 571). The same remarks might apply to cases where the mortgage-debt has been paid off by the usufruct or otherwise. (See notes to art. 105). The case of a deed of conditional sale which "executed itself" as a conveyance on the expiration of the term fixed was also similar. (See Mallkarjunudu *v.* Mallkarjunudu, I. L. R., 8 Mad., 185). When article does, or, does not apply.

Effect of dismissal of redemption suit or non-execution of redemption decree.

According to the practice of the Court of Chancery in England, if a bill for redemption was dismissed for any reason except for want of prosecution, the dismissal operated as a decree for foreclosure. A decree of dismissal for non-payment of the mortgage money within the time fixed was equivalent to a decree for a foreclosure. (See 11 Vesey., 199; 18 Vesey., 460, referred to in Ramunni *v.* Brahma, I. L. R., 15 Mad., 366, at p. 368). Where no definite period for redemption is fixed by the decree in a suit for redemption, the mortgagor must redeem within the time allowed by art. 179, and if he fails to do so, the decree will, according to the Bombay High Court, operate as a decree for foreclosure. (Maloji *v.* Sagaji, I. L. R., 13 Bom., 567, following Gansavant *v.* Narayan, I. L. R., 7 Bom., 467; Anrudh *v.* Sheo Prosad, I. L. R., 4 All., 481). The time allowed by art. 179 to execute a decree for redemption is *three* years where no application for execution has been made within that period. But if the decree is kept alive by successive valid applications, the mortgagor may have a much larger period than three years for redemption. (Narayan *v.* Govind, I. L. R., 16 Bom., 480, at p. 485). It has been held in Calcutta and Madras, that if the decree in a suit for redemption does not expressly *declare* that the mortgagor will be foreclosed if he does not redeem within a *fixed* time, a second suit for redemption may be instituted within the period allowed by art. 148. (Munmohun *v.* Poreshnath, 22 W. R., 174; Sami *v.* Sama, I. L. R., 6 Mad., 119; Periandi *v.* Angappa, I. L. R., 7 Mad., 423; Kuruthasami *v.* Juganatha, I. L. R., 8 Mad., 478; Ramunni *v.* Brahma, I. L. R., 15 Mad., 366). Cf. Hari *v.* Shapurjee, I. L. R., 10 Bom., 461, P. C., and see Ghose's Law of Mortgage, 267. In the Privy Council case their Lordships did not hold that the Madras decisions were correct. They simply said that *supposing* those decisions were correct, they could not be availed of by the mortgagor in the case before them. Where a mortgagee obtained a decree for sale, but failed to execute his decree by selling the mortgaged property, it is competent to the mortgagor, according to the Bombay High Court, to bring a suit for redemption. (Dasaratha *v.* Nyahalchand, I. L. R., 16 Bom., 134). But according to Macpherson and Bannerji, JJ., the existence of even a decree *nisi* for sale is a bar to a separate suit for redemption by the mortgagor. (Siva *v.* Nundo, I. L. R., 18 Calc., 139, at p. 142). Where the decree *nisi* in a suit for redemption or for foreclosure *does fix* a time within which the mortgage money must be paid, in order that the mortgagor may not be debarred of all rights to redeem, he cannot, according to the Madras High Court, redeem the mortgage *after* the time so fixed. (Elayadath *v.* Krishna, I. L. R., 13 Mad., 267). According to the Calcutta High Court, the mortgagor may redeem at any time until the *order absolute* is made on application by the opposite party. (Poresh *v.* Ram Jadu, I. L. R., 16 Calc., 246; Ajudhia *v.* Baldeo, I. L. R., 21 Calc., 818, at p. 824). Even if the decree does not declare that the mortgagor shall be debarred of all rights to redeem if he does not pay the amount within the time fixed by the Court, he cannot, according to the Allahabad High Court, redeem the mortgage *after* the expiry of the time so fixed. (See Jai Kishen *v.* Bhola, I. L. R., 14 All., 529, at p. 531).

Mortgage changed into conveyance.

Where after the expiration of the period prescribed in a mortgage for redemption, instead of agreeing to go on upon the footing of the mortgage, the mortgagor and mortgagee agreed that the latter should continue in absolute possession for a fixed term and then restore the property free from the mortgage lien, it was held that the agreement amounted to a conveyance for a term of years, and that art. 144

—not art. 148—applied to the mortgagor's suit for recovery of the property after the expiration of the term. (Gopal *v.* Desai, I. L. R., 6 Bom., 674).

Conditional sale-deed executing itself.

In the *absence* of any *law* (like Beng. Reg. XVII of 1806, or sec. 60 of the Transfer of Property Act, 1882) or of any *rule of property* established by judicial decision (Thumbusawmi *v.* Hossain, I. L. R., 1 Mad., 1, 23, P. C.) a deed of conditional sale may *execute* itself, and the title of the mortgagee may become absolute by virtue of of the *terms* of the contract immediately on default of payment within the time stipulated. (Mallikarjunudu *v.* Mallikarjunudu, I. L. R., 8 Mad., 185 ; p. 851, *supra*). Such a mortgagor's suit to recover possession against the mortgagee, after default is governed by art. 144 and not by art. 148. The possession of the mortgagee after the default is (by the terms of the contract) a possession as *absolute* owner, and not as *mortgagee*. (*Ibid.* See also Bhola *v.* Ajudhia, 2 Weekly Notes, 84 ; Rivaz, 4th Ed., 237).

Possession as *mortgagee*, not changed by *assertion* of adverse title.

The mere assertion of an adverse title by a mortgagee in possession does not enable him to abbreviate the period of sixty years. (Ali Mahammad *v.* Lulta Buksh, I. L. R., 1 All., 655). Where the defendant entered into possession as agent or trustee for the mortgagee of the property, he cannot set up an adverse possession as owner so as to defeat the mortgagor's right to redeem. The defendant alleged that he had purchased the equity of redemption, but this purchase being found to be invalid he was not allowed to plead adverse possession. (Bhagvant *v.* Kondi, I. L. R., 14 Bom., 279). In a suit for the redemption of a mortgage, neither the original mortgagee nor his son can rely on the twelve years' rule of limitation unless he can prove a subsequent valid sale by the mortgagor or his representative, in the absence of which his possession must be taken to retain its original character, *i.e.*, must be taken to be the possession of a mortgagee. (Byari *v.* Puttana, I. L. R., 14 Mad., 38). Even the fact that the mortgagee paid the arrears of revenue and was thereupon put into possession, does not make his possession adverse to the mortgagor. (Dasarath *v.* Nyhal, I. L. R., 16 Bom., 134).

As to what is adverse possession, in the case of mortgaged property, see Chinto *v.* Janki, I. L. R., 18 Bom., 51, and pp. 148—154, *supra*, and notes to arts. 135, 144, 146 and 147.

Laches.

The doctrine of laches does not apply to a suit for redemption. (Jugurnath *v.* Syed Shah, 23 W. R., 99, P. C. (See p. 69, *supra*).

Where art. 148 does not apply.

Art. 148 applies to suits against a mortgagee or against persons claiming as assignees under the mortgagee, but not against persons who for value purchased the mortgaged property as absolute property by a private sale, or in execution. (See notes to art. 134). It does not apply to suits against strangers, nor to suits which are not suits for redemption or for recovery of property mortgaged. (Amu *v.* Ramkrishna, L. R., 2 Mad., 226 ; Anglo-Indian Codes, Vol. II, p. 997). See pp. 153, 154, *supra*, and cf. Vithoba *v.* Gunga Ram, 12 Bom., 180, and Chinto *v.* Janki, I. L. R., 18 Bom., 51. The mortgagor's suit for redemption against the mortgagee *and* a *third* person who has dispossessed the mortgagee is governed by art. 144, and it lies upon such third person to prove that his possession for twelve years prior to the suit was adverse to the *mortgagor*. (Chinto *v.* Janki, I. L. R., 18 Bom., 51). If the owner of the right of redemption of *part* of an estate under mortgage pays the whole debt and redeems the whole mortgage, he thereby puts himself in the place of the mortgagee and holds the other parts of the estate as a security for the surplus payment he may have been obliged to make. (Asansab *v.*

Redemption by co-mortgagor.

Redemption by co-mortgagor.

Vamana, I. L. R., 2 Mad., 223). A suit by the other owners of the equity of redemption for recovery of their shares of the property will, in this view, be governed by the sixty years' rule under art. 148. (See Nura Bibi *v.* Jagat Narain, I. L. R., 8 All., 295 ; Ashfaq *v.* Wazir, I. L. R., 11 All., 423, and 14 All., 1, and p. 151, note, *supra*). Where one of several co-mortgagors redeems the whole mortgage, the other mortgagors may sue the former for their shares of the mortgaged estate within sixty years of the expiry of the mortgage term. They are not entitled to sixty years from the date of the redemption of the whole mortgage. (Ashfaq *v.* Wazir, I. L. R., 11 All., 423, at p. 433). See p. 151, *supra*. The possession of the redeeming mortgagor cannot *possibly* be adverse to his co-mortgagors until the date of redemption, and the latter will have, *at least*, twelve years to recover their shares under art. 144. (See Umrunnissa *v.* Muhammad, I. L. R., 3 All., 24, F. B. ; Chathu *v.* Aku, I. L. R., 7 Mad., 26. Ramchandra *v.* Sadasiv, I. L. R., 11 Bom., 422 ; Moidin *v.* Oothuman, I. L. R., 11 Mad., 416). In the last two of these cases it was held that art. 144 might apply if the redeeming co-mortgagor set up an adverse title after the redemption.

Mortgage satisfied by usufruct.

And when a usufructuary mortgage is satisfied out of the usufruct (and not redeemed by any one of several co-mortgagors), each co-mortgagor is entitled to take possession of his own share, and if any one of the co-mortgagors take possession of the share of any other of them, such possession is adverse to the latter. A suit for recovery of possession in such a case is governed by art. 144. (Gobardhan *v.* Sujan, I. L. R., 16 All., 254 ; Fakir *v.* Sadat, I. L. R., 7 All., 376).

Acknowledgment by a co-mortgagor.

As to the effect of an acknowledgment by the mortgagee or his agent in giving a new period of sixty years, see sec. 19 and p. 278, *supra*. An acknowledgment by one of the several heirs of a mortgagee was not sufficient under Act IX of 1871. (Bhogilal *v.* Amritlal, I. L. R., 17 Bom., 173). Under sec. 21 of Act XV of 1877 such an acknowledgment is insufficient to bind the other heirs. Where the mortgagee's liability is not *apportionable*, such an acknowledgment is *wholly* ineffectual. See pp. 302, 303, *supra*.

Is *office* immoveable property.

As to whether the right to officiate as priest at the funeral ceremonies of Hindus in a particular mouza is immoveable property within the meaning of this article, see Raghoo *v.* Kasi, I. L. R., 10 Calc., 73 ; and pp. 177, 205, 206 (notes), *supra*.

Onus.

The *onus* is on the plaintiff to prove when the term fixed by the mortgage expired. (Rajah Kissen Dutt *v.* Norendra, L. R., 3 I. A., 85). The *onus* of proving that a suit for the redemption of a mortgage is brought within time (*e.g.*, that the mortgage term expired within sixty years, lies upon the plaintiff, the mortgagor. (See Parmanand *v.* Sahibali, I. L. R., 11 All., 438, at p. 449 ; and p. 94, *supra*).]

Art. 149.	149.—Any suit by or on behalf of the Secretary of State for India in Council.	Sixty years ...	When the period of limitation would begin to run under this Act against a like suit by a private person.

[No. 149. (No. 150, Act IX ; sec. 17, Act XIV).

Beng. Reg. II of 1805.

As to the old law on the subject, see pp. 42, 46, 55, *supra*. Beng. Reg. II of 1805 allowed sixty years to suits by or on behalf of Government for any *public* rights or claims whatever, in the *mofussil* of the Presidency of Bengal. Sec. 17, Act XIV of 1859, left the law on this subject unaffected by its provisions. Reg. II of 1805 was

repealed by Act VIII of 1868. (See the note to sec. 17, Act XIV of 1859, p. 477, *supra*). Act IX of 1871 prescribed sixty years' limitation to suits in the name of the Secretary of State for India in Council. Act XV of 1877 prescribes the same period for suits by or on behalf of the Secretary of State for India in Council. A suit brought in the name of the Secretary of State by a private person for his own benefit does not fall under this article. A suit brought by the Collector or other person on behalf of the Secretary of State is governed by this article. (See Starling, p. 213). Acts of 1871 and 1877.

Under Beng. Reg. II of 1805 it was necessary to consider whether the suit was in respect of a *public* right. The recovery of costs incurred by Government in the character of *agents* was not a public right. (Government *v.* Shurrafoonnissa, 3 W. R., P. C., 31). Under Reg. II of 1805, sixty years was fixed as the *absolute* limit beyond which neither fraud nor any other special allegation gave the Government a cause of action. (Bromanund *v.* The Government, 5 W. R., 136). It is otherwise under Acts IX and XV. Public rights. No extension of period under Beng. Reg. II.

Art. 149 does not affect sec. 45, Act IX of 1880 as amended by Act II of 1881, B. C. In Bengal, arrears of revenue and other public demands may be recovered under the Certificate Procedure Act, VII of 1880, B. C. Even the Collector cannot recover more than three years' arrears of road-cess or public-works-cess. (Sec. 45, Act IX of 1880). Special law not affected by article.

As to actions and contracts by the Secretary of State, see secs. 65 and 68 of 21st and 22nd Vic. Chap., 106. The 21st and 22nd Vic. Chap., 106, put an end to the East India Company. The property and assets of the Company were not transferred to any body corporate as successors to the Company; they were vested in the Crown in trust for the Government of India. The Secretary of State for India in Council may sue and be sued as a corporate body. But it has been said that a suit against him is not a suit against a *real* corporate body, and that he is only a *nominal* defendant. The Governor-General of India in Council, or the Secretary of State for India in Council, it is said, is incapable of holding property as a trustee. (Kinlock *v.* Secretary of State for India in Council, L. R., 15 Ch. Div., 1; Doya Narain *v.* Secretary of State, I. L. R., 14 Calc., 256, at pp. 271, 272). Referring to the words "the Secretary of State for India in Council," Lord Justice James said "there is no such body known except as a name, for suing or being sued on behalf of the Indian Exchequer." (*Ibid.*) But it has been pointed out by Pigot, J., in a recent case (Secretary of State *v.* Guru Proshad, I. L. R., 20 Calc., 51, at pp. 63—66), that Kinlock *v.* Secretary of State did *not* decide that in cases coming *within* the provisions of 21 and 22 Vic. Chap., 106, (and these are the cases with which we are concerned), the Secretary of State for India in Council as representing the Government of India could not be sued as a trustee. The learned Judge referred to another English case which showed that the East Indian Company, the Government of India, and the Secretary of State for India in Council were liable to be sued as trustees. (See p. 596, *supra*). The Secretary of State in Council may be sued to enforce a liability with which the revenue of India would be chargeable. (Per Petheram, C. J., in I. L. R., 20 Calc., 51, at p. 56). E. I. Co., the Crown, and Secretary of State. Is Secretary of State a nominal party? He is liable to be sued as a trustee.

Applications for execution of decrees by or on behalf of Government are, it has been held, governed by the ordinary rule applicable to private suitors. (See Construction No. 13-48; Cal. Sud. Dew. Rep. for 1854, p. 426; The Collector *v.* Sreehury, 22 W. R., 512; Applications by Government

governed by *ordinary* law.

Appaya *v.* The Collector, I. L. R., 4 Mad., 155; Venubai *v.* Collector, I. L. R., 7 Bom., 552, note). It is true that in Shamee Mahomed *v.* Moonshee Mahomed (11 W. R., 67), Norman and Jackson, JJ., held, that the right of Government to the value of the stamp duty which had been remitted in respect of a *pauper* suit was a *public* right within the meaning of Reg. II of 1805, and that the Crown not having been named in sec. 20, Act XIV of 1859, was not barred by the three years' limitation provided for in that section. But under Act IX of 1871, it was held that, as regards the question of limitation, so far as *appeals* and *applications* were concerned, the Legislature made no difference between Government and its subjects. (Venubai *v.* The Collector, I. L. R., 7 Bom., 552, note; Appaya *v.* Collector, I. L. R., 4 Mad., 155).

Nullum tempus—

It has not yet been finally decided by all the High Courts that the *Common Law* maxim *nullum tempus occurrit regi* (no time affects the Crown) applies to this country. The maxim could hardly have applied to the East India Company, and so far as the Secretary of State in Council, under 21 and 22 Vic. Chap., 107, stands in the place of the old Company, it may be doubted if the maxim applies even to him. (See Appaya *v.* The Collector, I. L. R., 4 Mad., 155; Collector *v.* Rajaram, I. L. R., 7 Bom., 542, 545). But it has been held in Bombay that the *rule of construction* that the Crown is not bound by a *statute* of limitation or prescription unless named in it, applies to the Secretary of State for India in Council. (Ganpat *v.* Collector, I. L. R., 1 Bom., 7; Secretary of State *v.* Mathurabhai, I. L. R., 14 Bom., 213, at p. 218. See also pp. 201 and 439, *supra*).

Rule of construction.

Suits, appeals and applications by Government.

As Act XV contains express provisions prescribing limitation to Government for the institution of *suits* (art. 149), and the presentation of criminal *appeals* (art. 157), it may be inferred that the Legislature contemplated that the Crown should enjoy a privilege to the extent expressed and no further—*expressum facit cessare tacitum*. (Appaya *v.* The Collector, I. L. R., 4 Mad., 155). It may be observed, however, that the third division of the second schedule of Act XV which relates to *applications*, does not make any express provision as regards applications by Government. (See pp. 438 and 439, *supra*, as to the effect of naming the Crown in one part of a statute, and not naming it in another). Sargent, C. J., and Candy, J., are of opinion that the express mention of the Secretary of State or the Government in arts. 149 and 157 (which relate to questions of *limitation*) cannot have the effect of making the secs. 26 and 27 (which deal with the question of the *acquisition* of easements) applicable to Government. (Secretary of State *v.* Mathurabhai, I. L. R., 14 Bom., 213, at p. 219).

Acquisition of easements against Government.

Nullum Tempus *Act.*

Art. 149 and the corresponding provisions of the Bengal Regulation fixing a period of sixty years as the period of limitation are similar to the provisions of the *Nullum Tempus* Act (IX Geo., 3, c. 16) passed in the regin of George the Third, with this difference that the English Act applies to suits to recover lands and hereditaments, whereas art. 149 of the Indian Act refers to *all* suits whatever. In England there is still no limit to the time for the recovery of Crown *debts*. (Banning, 2nd Ed., 274).

Onus of proof in suit *by* or *against* Government.

In a suit instituted *by* Government (or rather, by the Secretary of State) for a declaration of title it is incumbent on the plaintiff to show possession of the proprietary right claimed within sixty years, or if the defendant proved possession, that such possession commenced or became adverse within such period. (Secretary of State *v.* Vira Rayan, I. L. R., 9 Mad., 175). A plaintiff who brings a suit *against* the Secretary of State for India in Council may establish his title to

immoveable property if he proves twelve years' adverse possession against Government. Art. 149 has no application to such a suit. (Secretary of State *v.* Bavotti, I. L. R., 15 Mad., 315). Even in a suit which falls under art. 149, if the question to be decided is not a question of limitation, the fact of possession of the land by the defendant for upwards of twelve years may be used by the defendant not to make a title, but to define or identify the land claimed by him. (Secretary of State *v.* Durbijoy, I. L. R., 19 Calc., 312, P. C.)

Suits by *mutwallees*.

Where the Mahomedan Government had made an endowment for pious and beneficial purposes, and the plaintiff, upon his appointment as *mutwallee* or superintendent of the endowment, sued to recover possession of property belonging to the endowment, it was held that, under Beng. Reg. XIX of 1810, the *mutwallee* was the agent of Government for performing its duty of protecting the endowment from misapplication, and that the suit fell within the sixty years' rule under Reg. II of 1805. (Jewan Dass *v.* Shah Kubeerooddin, 6 W. R., P. C., 3). As the Government has now divested itself of the management of religious endowments and as the provisions of Reg. XIX of 1810 have been modified, the ordinary rules of limitation are now applicable to suits by *mutwallees*. (Shaik Laul *v.* Lalla Brij, 17 W. R., 430). See p. 778, *supra*.

When Government is or is not properly a party.

Where the Government has no title to intervene in a contest between two private owners (from whom the Government is only entitled to a *jumma*), it cannot, by improperly making common cause with the plaintiff, extend the period of limitation to sixty years. (Gunga Govind *v.* The Collector, 7 W. R., P. C., 21 ; p. 331, *supra*). But where a *ghatwallee* mehal was attempted to be converted into a *mal* mehal by the collusion of the zemindar and the former *ghatwal*, the Government, it was held, could properly make common cause with a succeeding *ghatwal* for the recovery of the *ghatwallee* lands. The sixty years' limitation was applied in this case. (Petumber *v.* Juggurnath, 18 W. R., 130). See also Bromanund *v.* Government, 5 W. R., 136. But compare the remarks of Markby, J., in Erskine *v.* The Government, 8 W. R., 232, 238.

Assignees or grantees of Government.

It has been held that a private person, by the mere fact of his purchasing a *khas mehal* from Government, does not get sixty years within which to bring his suit for recovery of lands belonging to such mehal, and that such a purchaser is bound by the ordinary rule of limitation. (Hossein *v.* Ameena, 20 W. R., 231 ; Boondi Roy *v.* Pundit Bunsee, 24 W. R., 64). Where the plaintiff, as lessee under a Government settlement, claimed certain lands of which the defendant, another lessee of Government, had held possession for more than twelve years, it was held that the plaintiff was not entitled to the extended limitation under Reg. II of 1805. (Assoo *v.* Rajoo, 10 W. R., 76). Compare Doe d. Rex *v.* Roberts, 13 Mee. and W., 520, and Doe d. Watt *v.* Morris, 2 Bing. N. C., 189. A person claiming under the Government is of course *bound* by the sixty years' rule laid down in art. 149 ; so that if a suit by Government to resume a lakhiraj holding in a *khas mehal*, is barred by art. 149, a similar suit by the holder of an intermediate tenure under the Government is also barred, although he purchased the tenure at a revenue sale under secs. 11 and 12 of Act VII of 1868, B. C. (Koylashbashinee *v.* Gocoolmoni, I. L. R., 8 Calc., 230). See notes to arts. 123 and 130. It should be observed, however, that purchasers at revenue sales do not, in general, claim under the Government, and their suits for resumption are, generally speaking, governed by arts. 121 and 130 only. (See pp. 774, 789, *supra*).

Purchaser at a revenue sale.

Assignee of Crown *debts* in England.

If the Crown transfer a Crown *debt* (which is not subject to *any* limitation in England) to a private person, *after* the period of limitation prescribed for private debts has elapsed, the assignee will not be barred of his right of action until the ordinary rule of limitation has been in operation for the prescribed period from the time when the Crown debt vested in the assignee. (See Lambert *v.* Taylor, 4 B. and C., 138; Darby and Bosanquet, 2nd Ed., 516). If a private debt (subject to a limitation of six years) falls due four years before it becomes vested in the Crown, and such debt is again transferred to a subject, the private assignee of the debt may probably recover the debt within two years of the time when the Crown transferred the debt to him. (*Ibid.*)

Assignee of Crown *lands.*

But it has been held in England that if a subject purchases *land* from the Crown, of which another has been in adverse possession for twelve years, the purchaser cannot sue to recover possession although the Crown would not be barred by limitation. (Doe *v.* Watt, 2 Scott., 170; Starling, 3rd Ed., 327).

Where Government is the transferee.

In escheated and forfeited estates, Government merely steps into the rights of the former proprietor. In the absence of any special law, any suit brought by or on behalf of the Secretary of State for India in Council is governed by the sixty years' rule. But if the right of a private person has, before the transfer to Government, been *extinguished* by the operation of limitation, the transfer to Government cannot revive it. The same principle will apply where the claim of the private person is only *barred* by limitation at the date of the transfer. Where, however, the period of limitation has not expired at the date of the transfer, Government will be entitled to avail itself of the provisions of art. 149. (See Rex *v.* McErall, 6 Price, 24; Lambert *v.* Taylor, 4 B. and C., 153; Darby and Bosanquet, 409; Brown, 244, 245). The transfer removes the pressure of the ordinary rule of limitation, and stops the operation of that rule in the same way as a repeal of the rule would have done. (See pp. 241—243, notes, *supra*). In England, the privilege of the Crown has been extended to a lessee of the Crown out of possession more than twenty years. (Doe d. Rex *v.* Roberts, 13 Mee. and W., 520; Banning, 251). But a grantee of the Crown is not, in general, entitled to the privilege of the Crown. (See Lee *v.* Norris, Cro. Eliz., 331; Doe d. Watt *v.* Morris, 2 Bing. N. C., 189; Brown, 94). It is *expressly* provided by sec. 4 of 24 and 25 Vic. Chap., 62, that where the Crown has made a lease of any hereditament, the right of the Crown against any person whose possession commences subsequently to the lease shall not be considered to accrue till the expiration of the lease. The principle of this enactment is the same as the principle of the ruling in the well-known case of Krishna Govind *v.* Hurichurn, I. L. R., 9 Calc., 367. See p. 145, *supra.*]

English law.

SECOND DIVISION: APPEALS.

Appeals.

[Secs. 4, 5, 6 and 12 apply to appeals as well as to suits and applications. See the notes to those sections.

Application for leave to appeal.

An application for leave to appeal as a pauper (sec. 592, Civil Procedure Code), or an application for the admission of an appeal to Her Majesty in Council (sec. 598, *ibid.*), is not an appeal. Such applications are provided for by arts. 170 and 177. It may be mentioned here that, unless there be something repugnant in the context, the words "A High Court" include the highest civil court of appeal in any Province of British India. The Chief Court of the Punjab and the Court of the Judicial Commissioner of Burmah are High Courts. (See Act I of 1868).]

High Court.

150.—Under the Code of Criminal Procedure from a sentence of death passed by a Sessions Judge.	Seven days ...	The date of the sentence.	Art. 150.

[This case was formerly provided for by the Code of Criminal Procedure, Act X of 1872, sec. 271.]

151.—From a decree or order of any of the High Courts of Judicature at Fort William, Madras and Bombay or the Chief Court of the Punjab,* in the exercise of its original jurisdiction.	Twenty days ...	The date of the decree or order.	Art. 151.

[The rules of the High Courts formerly provided for these appeals. As to appeals from original decrees of the Punjab Chief Court, see Act XVII of 1877, secs. 17 and 18.

"The date of the decree."—As the decree is to bear date the day on which the judgment is pronounced (sec. 205 of the Code), the appeal should be filed within 20 days from the day on which the judgment is pronounced. It had been held that so long as the Legislature did not alter the law, this rule applied even when the decree was not drawn up and signed until after 20 days had expired from the delivery of the judgment. If the party against whom judgment was given applied for a copy of the decree *before* these 20 days expired, his appeal might be saved by the provisions of sec. 12. (Ramey *v.* Broughton, I. L. R., 10 Calc., 652. See also Bechi *v.* Ahsanullah, I. L. R., 12 All., 461, F. B.) But see Banimadhub *v.* Kali Shunker, I. L. R., 13 Calc., 104, F. B., and the notes to sec. 12. According to the Calcutta Full Bench ruling the mere fact, that the decree is not actually signed by the Judge entitles the appellant to ask for a deduction in the computation of time, under sec. 12.]

152.—Under the Code of Civil Procedure, to the Court of a District Judge.	Thirty days ...	The date of the decree or order appealed against.	Art. 152.

[Any order made upon an application for a review of judgment (except an order rejecting the application) becomes, if it in any way modifies or alters the original order (although the modification or alteration extends only to the rectification of a clerical mistake), the final order in the case. The party aggrieved by the original decree is entitled (although the modification or alteration was made in his favor) to treat the order upon review of judgment as the final decree or order in the case, and may appeal within thirty days from its date. (Joykissen *v.* Ataoor, I. L. R., 6 Calc., 22). The same rule applies if an application for review of judgment is granted, although on review the original decree is ultimately upheld. See notes to secs. 5 and 12.

The Central Provinces Civil Court Act (XVI of 1885) allows sixty days for an appeal to the Court of the *Commissioner*.]

153.—Under the same Code, section 601, to a High Court.	Thirty days ...	The date of the order refusing the certificate.	Art. 153.

* The words "or the Chief Court of the Punjab" are inserted after "Bombay" by Act XVII of 1877, sec. 12.

[This appeal is to a High Court, from an order refusing to certify that a final decree, passed by a Court subordinate to a High Court, is such that it may be appealed to Her Majesty in Council.

The words "within thirty days from the date of the order" in sec. 601 have been repealed by sec. 57, Act VII of 1888; so that art. 153 is now in full force.]

Art. 154.	154.—Under the Code of Criminal Procedure, to any Court other than a High Court.	Thirty days ...	The date of the sentence or order appealed against.
Art. 155.	155.—Under the same Code, to a High Court, except in the cases provided for by No. 150 and No. 157.	Sixty days ...	Ditto.

[As to exclusion of time in the computation of the periods of limitation, see Empress *v.* Lingaya, I. L. R., 9 Mad., 258, and the notes to secs. 4 and 12. The time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded. Presentation of the petition of appeal to the officer in charge of the jail is equivalent to presentation to the Court. (I. L. R., 9 Mad., 258).

Extradition Act. An appeal preferred to the High Court under the Extradition Act is not governed by these articles. The Criminal Procedure Code has no application to such an appeal. (See Hayes *v.* Christian, I. L. R., 15 Mad., 414). An appeal in such a case may be admitted even after the sixty days allowed by art. 155.]

Art. 156.	156.—Under the Code of Civil Procedure, to a High Court, except in the cases provided for by No. 151 and No. 153.	Ninety days ...	The date of the decree or order appealed against.

[A second appeal to the Judicial Commissioner of British Burmah under secs. 27 and 34 of the Burmah Courts Act of 1875 (though it is an appeal to a High Court) is not governed by this article. (Mahomed *v.* Inodeen, I. L. R., 10 Calc., 946). But an appeal from the Court of the Recorder of Rangoon to the Calcutta High Court is an appeal under the Civil Procedure Code, and is therefore governed by art. 156. (Aga Mahomed *v.* Cohen, I. L. R., 13 Calc., 221).

Letters Patent Appeals. Letters Patent Appeals to the High Court (not being appeals under the Code of Civil Procedure) are governed by the Rules of Practice. (See Naubat *v.* Harnam, I. L. R., 9 All., 115, F. B.; *In re* Hurruck Singh, 11 W. R., 107; Hurruck Singh *v.* Toolseeram, 12 W. R., 458). Thirty days only are allowed by the Rules of Practice of the Calcutta High Court. The Appellate Bench may, on good cause shewn, grant further time.

Preliminary and final decision. The party against whom a decision has been given on a preliminary point may, if he chooses, appeal against such decision within ninety days from the date of such decision. He may also wait until the whole case is disposed of by a final decree, and then appeal within ninety days from the date of such decree. (Mirza Himmut *v.* Gobind Panday, 5 W. R., 91, F. B.)

An appeal may be *rejected* at any time under sec. 543, Civil Procedure Code. (Damodar *v.* Gokul, I. L. R., 7 All., 79, at p. 85).]

157.—Under the Code of Criminal Procedure, from a judgment of acquittal.	Six months	... The date of the judgment appealed against.	Art. 157.

[For the old law on the subject, see sec. 272, Act X of 1872 ; sec. 23, Act XI of 1874 ; and Empress *v.* Jyadulla, I. L. R., 2 Calc., 436, F. B.]

THIRD DIVISION : APPLICATIONS.

[Secs. 7—9, 14, 17—19 of the Act apply to applications as well as to suits. Secs. 4, 5, 6 and 12 apply to applications as well as to suits and appeals.]

158.—Under the Code of Civil Procedure, to set aside an award.	Ten days	... When the award is submitted to the Court.	Art. 158.

[Chap. 37 of the Code of Civil Procedure is referred to here. Under sec. 522 of the Code, if no application is made within the prescribed period to set aside the award of arbitrators (to whom any matter in dispute between the parties has been referred by the Court), the Court is bound to give judgment according to the award, provided it sees no cause to remit the award for the reconsideration of the arbitrators. Art. 158 applies to an application to *set aside* an award on any of the grounds *mentioned* in sec. 521. (Muhammed *v.* Muhammed, I. L. R., 8 All., 64). As to the computation of the period, see sec. 12, last paragraph. In the absence of any special Rule of Practice to the contrary, an award may be considered as "submitted to the Court," at the time when it is filed in Court. According to Farran, J., there is no limitation to the time within which an award may be *modified*, or *corrected in part*. Art. 158 applies only when the application is for wholly *setting aside* the award. (See Cauji *v.* Janabai, Starling, 3rd Ed., p. 332).]

Award of arbitrator, sec. 522.

"Submitted."

"Set aside."

159.—For leave to appear and defend a suit under Chapter XXXIX of the Code of Civil Procedure.	Ten days	... When the summons is served.	Art. 159.

[Chap. 39 of the Code refers to summary procedure on negotiable instruments. See sec. 533 of the Code.]

160.—For an order under sec. 629 of the same Code, restoring to the file a rejected application for review.	Fifteen days	... When the application for review is rejected.	Art. 160.

[This article applies where an application for review has been rejected in consequence of the failure of the applicant to appear.]

160A.—For a review of judgment by a Provincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes, when exercising that jurisdiction.	Fifteen days	... The date of the decree or order.	Art. 160A.

[This article has been inserted by sec. 36 of Act IX of 1887 which came into force on the 1st July 1887. (See p. 526, *supra*). There is no provision in the Provincial Small Cause Courts Act or in the Civil Procedure Code for a *new trial*. (See notes to Art. 173).]

Art. 161.	161.—[Now 173A.		

See sec. 66, Act VII of 1888, p. 527, *supra*, and notes to art. 173A.]

Art. 162.	162.—For a review of judgment by any of the High Courts of Judicature at Fort William, Madras, and Bombay, *or the Chief Court of the Punjab** in the exercise of its original jurisdiction.	Twenty days	... The date of the decree or order.

[See sec. 623 of the Civil Procedure Code. Compare No. 173, which applies to applications for reviews of judgments of the Mofussil Courts, and of the High Court in the exercise of its appellate jurisdiction. The matrimonial jurisdiction of the High Court is original jurisdiction within the meaning of this article. (See King *v.* King, I. L. R., 6 Bom., 416, 434). Cf. art. 180.

Arts. 162—164, arts. 166—170, arts. 172 and 179, arts. 175, 177 and 180 do not *in terms* refer to the Code of Civil Procedure.]

Art. 163.	163.—By a plaintiff for an order to set aside a dismissal by default.	Thirty days	... The date of the dismissal.

[Default—Plaintiff's default in not appearing or not furnishing security. See sec. 103 and sec. 381 of the Civil Procedure Code as amended by sec. 33, Act VII of 1888, and compare art. 168. Sec. 99 of the Code prescribes a period of 30 days as regards the dismissal of a suit under sec. 97 of the Code.]

Art. 164.	164.—By a defendant for an order to set aside a judgment *ex parte*.	Thirty days	... The date of executing any process for enforcing the judgment.

[See sec. 108 of the Civil Procedure Code, and compare art. 169. Under this article, time does not begin to run until sometime after the accrual of the right to apply. The defendant has a right to apply to set aside an *ex parte* judgment, even though no attempt has been made to enforce the judgment.

Notice, not a *process*. Attachment or arrest is.

A notice to show cause why the decree should not be executed, under sec. 248 of the Procedure Code, is not a "process for enforcing the judgment." A legal process of attachment or arrest must be formally executed before time begins to run against the applicant. (Poorno *v.* Prosunno, I. L. R., 2 Calc., 123). The Court may presume that the process of attachment was regularly executed. But if the process issued appears to have been illegally or informally executed, time does not commence to run against the defendant. (Punj.

* The words "or the Chief Court of the Punjab" are inserted after "Bombay" by Act XVII of 1877, sec. 18.

Rec. No. 32 of 1878; Rivaz, 4th Ed., 243). The words "*any* process" must be read as meaning "the *first* process." (Pachu *v.* Jaikishen, 4 Weekly Notes, 322, cited in I. L. R., 7 All., 345). The date of executing the first process sets time running against the applicant, even if he is *not aware* of it. (Bhoobunessary *v.* Judobendro, I. L. R., 9 Calc., 869). Time runs from date of attachment, not from date of sale. (Hara Prosad *v.* Jafar Ali, I. L. R., 7 All., 345). The service of a precept or injunction on the defendant in pursuance of an order revoking a certificate under Act XL of 1858, and directing the defendant to deliver the minor's property to the applicant, may be sufficient. (Sunraj *v.* Ambika, I. L. R., 6 All., 144). An attachment of the debtor's property, although not in his possession, sets time running (Kalee *v.* Digamber, 25 W.R., 72), but if the property belongs to a third person, time does not commence to run. (Shib Chundra *v.* Lukhee, 6 W. R., Misc., 51; Sookh Moyee *v.* Nurmooda, 15 W. R., 210).

First process.

Injunction is a process.

Attaching property not in possession.

The procedure under which a decree of the Presidency Small Cause Court may be *reviewed*, or a *new trial* ordered, is not inconsistent with the procedure under which an *ex parte* decree may be set aside. The period of limitation (eight days) allowed by sec. 37 of the Presidency Small Cause Courts Act, 1882, is too short to be considered applicable to applications other than applications for new trials and reviews. Applications to set aside *ex parte* decrees of Presidency Small Cause Courts are governed by art. 164. (Roshanlal *v.* Lachmi, I. L. R., 17 Bom., 507).

Ex parte decrees of Presy. Small C. Ct.

Where a defendant appears at the *first* hearing of a suit but fails to appear at the *adjourned* hearing, and a decree is passed against him, such a decree is not an *ex parte* decree within the meaning of the Civil Procedure Code. (Sital *v.* Heeralall, I. L. R., 21 Calc., 269; Sahibzada *v.* Sahibzada, I. L. R., 2 All., 67, P. C.)

Absence of adjourned hearing.

Executing a process against one joint debtor, it has been held, is not sufficient to make time begin to run against the *other* debtor. (Raoji *v.* Ramji, Bom. Printed Judgments, 1888, 56; Rivaz, p. 243; and Starling, p. 334).]

Process against one joint debtor.

165.—Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days	... The date of the dispossession.	Art. 165.

[An application *by* the decree-holder or the execution-purchaser who is resisted or obstructed, in obtaining delivery of possession, is governed by secs. 328, 334 and 335 of the Civil Procedure Code, and the first portion of art. 167 of this Act. After delivery of *formal* possession by the Court, the decree-holder or the auction-purchaser may, if necessary, bring a regular suit for possession against the judgment-debtor. (Shama Churn *v.* Madhub, I. L. R., 11 Calc., 93), and the auction-purchaser may do so even *without* making any application to the Court executing the decree. (See p. 812, *supra*, and Kishori *v.* Chunder Nath, I. L. R., 14 Calc., 644; Sevu *v.* Muthu Sami, I. L. R., 10 Mad., 53).

Cf. art. 167.

When regular suit lies.

Under this article, the application is *against* the decree-holder or the purchaser. See secs. 332 and 335 of the Civil Procedure Code. An order passed on an application to which this article applies may be

Secs. 332 and 335 of Code.

Reg. suit. Limitation.

questioned in a regular suit to establish the right of the party against whom the order is given. Where the regular suit has reference to an order under sec. 335 of the Procedure Code, art. 11 applies. Where, however, the suit has reference to an order under sec. 332 of the Code, the ordinary rule of limitation may apply. (Ayyasami *v.* Samiya, I. L. R., 8 Mad., 82). But see pp. 661, 669, *supra*.

If no application is made under sec. 332 or sec. 335, the party dispossessed has the ordinary period of twelve years to bring his suit. (See Pertab *v.* Brojolall, 7 W. R., 253, F. B.; Kishen Sundar *v.* Fukeeroodeen, W. R., Gap Number, p. 61).

J. debtor dispossessed of land not comprised in decree.

Art. 165 refers mainly to applications by *third* parties. But a *judgment-debtor* who is dispossessed by the decree-holder in execution, of property *not comprised* in the decree, may dispute the right of the decree-holder to be put into possession of such property, and his application to the Court to set aside the delivery of possession must be made within thirty days either under art. 165 or the latter part of art. 167. (See Vythilinga *v.* Seetha Lakshine, 1 Mad. L. J., 42). In Mahomed *v.* Kokil (I. L. R., 7 Calc., 91), art. 165 was considered to be applicable to applications by the judgment-debtor who had been dispossessed under a sale in execution. As no specific section of the Code is mentioned either in art. 165 or in art. 167, both articles cover applications by judgment-debtors as well as by third parties. (See notes to art. 167, and 1 Mad. L. J., 42).

Sec. 5.

An application for restitution by a person dispossessed of immoveable property may, of course, be made on the next open day, if the thirty days allowed by this article expire on a holiday. (See sec. 5, and Gurjar *v.* Barve, I. L. R., 2 Bom., 673).]

Art. 166.	166.—To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale, *or on the ground that the decree-holder has purchased without the permission of the Court.*	Thirty days ...	The date of the sale.

[See secs. 294 and 311, Civil Procedure Code. Application by the purchaser under sec. 313, Civil Procedure Code, are specially provided for by art. 172. The words in Italics in the first column have been added by Act XII of 1879).

Act V of 1894.

Under sec. 310A of the Code of Civil Procedure (introduced by Act V of 1894), the judgment-debtor or the person whose immoveable property has been sold, may (if he does not make an application under sec. 311) get the sale set aside by depositing the amount for which the sale was ordered, plus five per cent. of the purchase-money paid by the auction-purchaser. This deposit must be made within thirty days of the sale. It has been very recently held in Calcutta by a Full Court of all the Judges that sec. 310A of the Code is retrospective in its operation, in so far as it may affect decree-holders who obtained their decrees before Act V of 1894 came into operation.

Decree-holder's fraud.

An application to set aside the proceedings in execution which have terminated in a sale of the debtor's property, on the ground of the fraud of the decree-holder in applying for execution in breach of an agreement entered into by him with the debtor, is not governed by this article. (Sakharam *v.* Damodar, I. L. R., 9 Bom., 468).

Notwithstanding sec. 18 it was held in Calcutta that the judgment-debtor could not, on the ground of fraud, apply to set aside the sale after it had been duly confirmed (Govind *v.* Umachurn, I. L. R., 14 Calc., 679). But this decision has been overruled by the Full Bench, and it has been held that the judgment-debtor may (even *after* the confirmation of sale) apply to set aside the sale, his time for making it being computed from the time when the *fraud* by which the sale or the irregularities in conducting it were kept concealed, first became known to him. (Mohendro *v.* Gopal, I. L. R., 17 Calc., 769, F. B.) Sec. 18 applicable.

A minor applicant is entitled to the benefit of sec. 7. The sale of his property should not be confirmed in the teeth of an application to set aside the sale filed by the minor's guardian simply because more than thirty days had elapsed at the date of such application. (Baldeo *v.* Kishen, I. L. R., 9 All., 411). Sec. 7 applicable.

As to the effect of an execution-sale not being set aside within the time allowed, see Chintaman *v.* Vitha, I. L. R., 11 Bom., 588.]

167.—Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property.	Thirty days	...	The date of the resistance, obstruction or dispossession.	Art. 167.

[See secs. 328, 334 and 335 of Civil Procedure Code, and notes to art. 165.

The first portion of art. 167 refers to applications *by* the decree-holder or the execution-purchaser, and the latter portion to applications *against* the decree-holder or the execution-purchaser. Art. 165 and the latter portion of art. 167 apparently overlap each other. The latter part of art. 167 covers an application by the judgment-debtor complaining of dispossession of property not comprised in the decree, as well as an application by a *third* party complaining of dispossession of any property of which he was in possession at the date of the delivery of possession by the officer of the Court. (See Vythilinga *v.* Seetha Lakshmi, 1 Mad. L. J., 42). Arts. 165 and 167 overlap each other.

Sec. 328 of the Civil Procedure Code, which was passed after Act XV of 1877 came into operation, enacts that the decree-holder may, in case of obstruction, complain to the Court at any time within one *month*. (See Damodar *v.* Gopal, I. L. R., 7 All., 79, at p. 91). Sec. 334 extends the provisions of sec. 328 to cases where the judgment-debtor obstructs the execution-purchaser in obtaining possession of immoveable property. Sec. 328 of Code. One month.

It is not compulsory on the decree-holder or the purchaser at an execution-sale to make an application under sec. 328 of the Civil Procedure Code. (Balvant *v.* Babaji, I. L. R., 8 Bom., 602). He may bring a regular suit instead of making an application against *third* parties. (*Ibid.*, see also Shoteenath *v.* Obhoy, I. L. R., 5 Calc., 331; Iswar *v.* Jainarain, I. L. R., 12 Calc., 169; Narohari *v.* Anapurna, I. L. R., 11 Bom., 160, 168; Kishori *v.* Chundernath, I. L. R., 14 Calc., 644). Application not compulsory.

Is a second application for delivery of possession allowable?

"The date of resistance or obstruction."—This is not necessarily the date of the first resistance or obstruction. Where a fresh warrant for possession was applied for and granted, and the person who resisted the execution of the first warrant renewed his resistance to the second, it was held that a complaint by the decree-holder made within thirty days from the date of the second obstruction was within time. (Ramasekara *v.* Dharmaraya, I. L. R., 5 Mad., 113). The decree-holder or execution purchaser, it has been held in Madras, may without complaining of resistance or obstruction make a *fresh* application for *delivery* of possession. (Muttia *v.* Appasami, I. L. R., 13 Mad., 504. See also Budham *v.* Fazl Ali, 11 Weekly Notes, 131; Rivaz, 4th Ed., 246). If the Court grants such application, it cannot be objected that it is barred by art. 167 which applies only to applications complaining of resistance or obstruction. (*Ibid.*) But in Bombay, a second application for delivery of possession, in such a case, is treated as an attempt to renew the old proceedings in which the applicant had neglected to complain of resistance or obstruction within the thirty days allowed by art. 167. (See Vinayakrao *v.* Devrao, I. L. R., 11 Bom., 473). The granting of the second application in such a case would virtually make art. 167 a dead letter. (See Shoteenath *v.* Obhoy, I. L. R., 5 Calc., 331).

Sec. 7.

A minor may apply within thirty days of his attaining majority. (Vinayakrao *v.* Debrao, I. L. R., 11 Bom., 473).

Sec. 331, Civ. P. Code.

Where a *decree-holder's* application complaining of resistance or obstruction by a third party is converted into a *suit* under sec. 331 of the Civil Procedure Code, the claim is governed by art. 144. (Haribhai *v.* Balojee, Bombay Printed Judgment, 1885, referred to by Mr. Starling, at p. 336 of the 3rd Edition of his work). The same principle has been applied to the case of an *execution-purchaser* where the purchaser happened to be also the decree-holder. (Namdev *v.* Ramchandra, I. L. R., 18 Bom., 37). But the provisions of the Civil Procedure Code would seem to make sec. 331 inapplicable to cases where *property* has been *sold* in execution of a decree, and not actually *decreed* to the applicant.]

Art. 168.	168.—For re-admission of an appeal dismissed for want of prosecution.	Thirty days ...	The date of the dismissal.

[See sec. 558 of the Civil Procedure Code, and compare art. 163. Time runs from the date of dismissal irrespective of any consideration other than one of those which come under some of the Exceptions applicable to the case.]

Art. 169.	169.—For a re-hearing of an appeal heard *ex parte* in the absence of the respondent.	Thirty days ...	The date of the decree in appeal.

[See sec. 560 of the Civil Procedure Code.]

Art. 170.	170.—For leave to appeal as a pauper	Thirty days ...	The date of the decree appealed against.

[See sec. 592 of the Civil Procedure Code. As to the non-applicability of sec. 5 to applications under art. 170, see Lakshmi *v.* Ananta, I. L. R., 2 Mad., 230; Parbati *v.* Bhola, I. L. R., 12 All. 79; Bechi *v.* Ashanulla, I. L. R., 12 All., 461.

The time for applying for leave to appeal as a pauper is thirty days even if the application has to be made to the Appellate Side of the High Court. (Parbati *v.* Bhola, I. L. R., 12 All., 79, at p. 93). Where an insufficiently stamped appeal was returned by the Court, and the appellant then asked leave to appeal in *formâ pauperis*, the appellant might count the 30 days allowed by this article from the date when his appeal was returned. But he could not claim the three years' limitation under art. 178. (Mahadev *v.* Lakshman, I. L. R., 19 Bom., 48). Under art. 162 of Act IX of 1871, the period allowed was ninety days, whether the application was made to the District Court or to the High Court. Mr. Starling thinks that a petition for leave to appeal from a decree on the *original* side of a High Court should with reference to art. 151 be filed within 20 days. (See Starling, p. 223). But an article in a Limitation Act should be construed in favor of the right to proceed, at least, where a literal construction does not cause inconvenience or injustice.]

Insufficiently stamped appeal.

Original Side of High Court.

171.—Under sec. 371 of the Code of Civil Procedure, or under that section and section 582 of the same Code, for an order to set aside an order for abatement or dismissal.	Sixty days	... The date of the order for abatement or dismissal.	Art. 171.

[This is art. 171C (of Act XII of 1879) as amended by Act VII of 1888. An order for the abatement of a suit (or an appeal) may be passed by the Court under sec. 366 or sec. 368 of the Code, after the death, either of a sole plaintiff, or (or sole appellant), or of a defendant (or respondent). An order for dismissal may be passed under sec. 370 on the application of the defendant (or respondent) after the insolvency of a plaintiff (or an appellant). Orders for the abatement or dismissal of a suit (or an appeal) are of course orders against the interest of the plaintiff (or the appellant). Applications to set aside such orders would therefore be applications by the plaintiff (or appellant) or by his legal representative. But sec. 371 of the Code speaks only of applications by the legal representative of a deceased or insolvent plaintiff (or appellant). There can be no application by the plaintiff (or appellant) to set aside an order of abatement under sec. 368, after the death of a defendant (or a respondent). The order of abatement would be made in Court; it would be the duty of the plaintiff (or appellant) to be present when the order was made, and to show cause against it. If the plaintiff (or appellant) could satisfy the Court that he had sufficient cause for not applying within the six months allowed to him by art. 175C, to bring in the legal representative of the deceased defendant (or respondent), the order for abatement would not be made at all. (See Suri *v.* Sitaram, I. L. R., 7 Mad., 195).

Application by *whom?*

Art. 171 applies only to applications by the legal representative of a deceased plaintiff (or appellant) to set aside an order of abatement under sec. 366 only; or by the legal representative of an insolvent plaintiff (or appellant) to set aside an order of dismissal under sec. 370.

It has been held that an application to revive a *pending* suit, *i.e.*, one in which no final order has been made, is not governed by art. 171 or art. 178 (Kedarnath *v.* Harra, I. L. R., 8 Calc., 420). But if the plaintiff is bound to bring in the representatives of a deceased party within six months of his death, he cannot do so after the period has expired unless he shews sufficient cause for his delay. (See secs. 366, 368 and 372A of the Code).

Reviving a *pending* suit.

After judgment, the *action* does not abate. (Muhammad *v.* Khusalo, I. L. R., 9 All., 131, F. B.)

Judgment against dead man.

The benefit of the judgment goes to the legal representative of the person obtaining it. (*Ibid.*) But a judgment obtained against a defendant on the mistaken supposition that he is alive cannot be executed against his legal representative. (Roopnarain *v.* Ramayee, 3 C. L. R., 192).

How Judge may revive suit.

Before Act XII of 1879 came into force, art. 178 was the only article applicable to applications under sec. 371 of the Civil Procedure Code. Notwithstanding the provisions of the Limitation Law, it is competent for a Judge to revive a suit (after the lapse of six months from the dates when the plaintiff and the defendant died) by making an order for abatement coupled with an order under sec. 371 setting aside the order for abatement. (Bhoyrub *v.* Doman, I. L. R., 5 Calc., 139; Fulvahu *v.* Goculdas, I. L. R., 9 Bom., 275).

Sec. 5.

The provisions of sec. 5 of the Limitation Act applicable to appeals apply to applications under secs. 365, 366, 368 and 371 of the Code of Civil Procedure. (See sec. 372A of the Code, and sec. 34 of Act VII of 1888).]

Art. 172.	172.—By a purchaser at an execution-sale, to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.	Sixty days	... The date of the sale.

[See notes to art. 166. An application made under sec. 313 of the Code comes under this article. The Court executing the decree may confirm the sale after the expiry of the 30 days allowed by art. 166 and before the expiration of the 60 days allowed by art. 172. (Haji *v.* Athraman, I. L. R., 7 Mad., 512). Art. 172 does not apply to an application for refund of the purchase-money under sec. 315 of the Code. (Sivaram *v.* Rama, I. L. R., 8 Mad., 99).]

Art. 173.	173.—For a review of judgment, except in the cases provided for by No. 160A and No. 162.	Ninety days	... The date of the decree or order.

Stamp.

Copy of judgment.

[This article applies to applications for review of judgments (under sec. 623 of the Code) not being judgments of a High Court in the exercise of its original jurisdiction, or of a Provincial Court of Small Causes. An application for review, though in time under this article (read with sec. 12), must bear *full* stamp if presented after the 89 days allowed by art. 4, sched. I, of the Court Fees Act. It might bear half the stamp if presented *before* 90 days from the date of the decree or order. (See p. 601, *supra*). Sec. 12, cls. 2 and 3, as to the time required for obtaining a copy of the decree, applies to applications under this article. See p. 598, *supra*. Notwithstanding the implication raised by cls. 2 and 3 of sec. 12, an applicant for a review of judgment is not *bound* to file a copy of the judgment, decree or order in respect of which the application is made. (Wajid *v.* Nawal, I. L. R., 17 All., 213).

This article does not apply to an application for an order to set aside a dismissal by default or a judgment *ex parte*. (See arts. 163 and 164 of this Act, and secs. 103 and 108 of the Code). An application to *amend* a decree under sec. 206 of the Code is not governed by this or any other article. (See notes to art. 178).

As to the difference between amending a decree under sec. 206 and amending it under the Review Sections, see Joykishen *v.* Ataoor, I. L. R., 6 Calc., 22.

An application for a *new trial* under sec. 21 of Act XI of 1865 (the old Mofussil Small Court Act) was not governed by this article, provided the circumstances of the case admitted of a new trial, and *did not admit of a review*. (Madon *v.* Purno, I. L. R., 10 Calc., 297). New trial. See pp. 862, 863, *supra*.

The mere pendency of an appeal (by another party) is not a sufficient cause for delaying an application for *review*. See p. 577, *supra*.]

173A.—For the issue of a notice under sec. 258 of the same Code, to show cause why the payment or adjustment therein mentioned should not be recorded as certified.	Ninety days	... When the payment or adjustment is made.	Art. 173A.

[Before Act XII of 1879, the corresponding Art. No. 161 of Act XV, referred to applications for *orders* to compel decree-holders to certify under sec. 258, and allowed twenty days only for such applications. Under Act XII of 1879, 20 days were allowed for an application for the issue of a *notice* under sec. 258. This article (as amended by Act VII of 1888) allows 90 days for the *same* purpose. Old and new law.

The *decree-holder* is not subject to any limitation, and may certify after any lapse of time. (Fakir *v.* Madan, 4 B. L. R., 130 ; Bhubuneshwari *v.* Deno Nath, 11 W. R., 232 ; Purmanand Das *v.* Vallabh Das, I. L. R., 11 Bom., 506). The decree-holder may certify a payment or any other adjustment of the decree in his application for execution. (See sec. 235, cl. (*e*), of the Code). But even *uncertified* payments may be proved for the purpose of preventing the bar of *limitation*. (Fakir *v.* Madan, 4 B. L. R., 130, F. B. ; Purmanand Das *v.* Vallabh Das, I. L. R., 11 Bom., 506 ; Kishan *v.* Aman, I. L. R., 17 All., 42 ; Hurri Pershad *v.* Nasib, I. L. R., 21 Calc., 542, at p. 549). If the decree-holder pleads part payment out of Court, that may itself (if certification be necessary) be regarded as an application to certify the payment. (5 Mad. L. J., p. 91). The case of Mitthu Lall *v.* Khairati, I. L. R., 12 All., 569, which lays down a different rule, has not been followed even at Allahabad. (See I. L. R., 17 All., 42). Decree-holder not bound by this article. Uncertified payments prevent limitation.

Where there is a payment which is neither in accordance with the terms of the *decree*, nor in pursuance of an *agreement* which has received the sanction of the Court under sec. 257A, Civil Procedure Code, the Court is bound (under the last clause of sec. 257A) to apply such payment to the satisfaction of the judgment-debt whenever it is brought to the notice of the Court. (Narayana *v.* Venkataramannya, 1 Mad. L. J., 332). An *uncertified* payment or adjustment cannot be recognized (as a *payment* or *adjustment* of the decree) by any *Court executing the decree*. (Sec. 27, Act VII of 1888, sec. 258, last clause ; and I. L. R., 21 Calc., 542, at p. 549). A separate regular suit is not barred by sec. 258 of the Code. (Poromanand *v.* Khepoo, I. L. R., 10 Calc., 354). Havi *v.* Khoji, I. L. R., 11 Bom., 6, appears to have been overruled by Act VII of 1888.] Sec. 257A. Regular suit, if payment is not certified.

Art. 174.	174.—By a creditor of an insolvent judgment-debtor, under section 353 of the Code of Civil Procedure.	Ninety days	... The date of the publication of the schedule.

Claim of creditors of insolvent debtor.

[This article does not apply to creditors of insolvent debtors on the original side of the High Courts of Calcutta, Madras and Bombay. (See sec. 360A of the Civil Procedure Code). Such creditors may claim to prove their debts within the time allowed by art. 57 *et seq.* See p. 694, *supra*, and Agabeg's case, 12 C. L. R., 165.

An application under sec. 352 of the Code is not governed by this article (I. L. R., 11 Mad., 1). An unscheduled creditor may, under sec. 353 of the Code, apply to have his name *inserted* in the schedule of creditors and debts, and a scheduled creditor may, under the same section, apply for an order *altering* the schedule in certain respects.

This article does not apply to a creditor wishing to prove his debt, where *no schedule* has been framed by the Court. Art. 178 applies to such cases. (Parshadi *v.* Chuney, I. L. R., 6 All., 142). Cf. Laksman *v.* Muttia, I. L. R., 11 Mad., 1.]

Art. 175.	175.—For payment of the amount of a decree by instalments.	Six months	... The date of the decree.

Order to pay by instalments.

[Under sec. 210 of the Code, after the passing of a decree for the payment of money, the Court may, on the *application* of the judgment-debtor, and with the consent of the decree-holder, order that the amount decreed be paid by instalments. An order for payment by instalments, made upon the petition of *both* parties more than six months after the decree, is *binding* upon the parties, notwithstanding art. 175. (Monmohun *v.* Durga Charan, I. L. R., 15 Calc., 502). But cf. Abdul *v.* Dallaran, I. L. R., 14 Calc., 348.]

Art. 175A. Death of plaintiff or appellant.	*" 175A.—Under sec. 365 of the Code of Civil Procedure by the legal representative of a deceased plaintiff, or under that section and section 582 of the same Code by the legal representative of a deceased plaintiff-appellant or defendant-appellant.	Six months	... The date of the death of the deceased plaintiff or of the deceased plaintiff-appellant or defendant-appellant.
Art. 175B. Death of plaintiff or appellant.	" 175B.—Under sec. 366 of the Code of Civil Procedure by a defendant, or under that section and section 582 of the same Code by a plaintiff-respondent or defendant-respondent.	Ditto	... The date of the death of the deceased plaintiff or of the deceased defendant-appellant or plaintiff-appellant.

* These new articles 175A, 175B and 175C, are inserted by Act VII of 1888, which came into force on the 1st July 1888. The superseded articles, with notes, are given below. An application for bringing upon the record the legal representatives of a plaintiff-respondent in an appeal instituted in 1885, if made *subsequent* to the 1st of July 1888, is governed by art. 175C of the new Act, VII of 1888. (Chajmal *v.* Jagadamba, I. L. R., 11 All., 408).

"175C.—Under sec. 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made a defendant, or under that section and sec. 582 of the same Code to have the legal representative of a deceased plaintiff-respondent, or defendant-respondent made a plaintiff-respondent or defendant-respondent.	Six months	... The date of the death of the deceased defendant or of the deceased plaintiff-respondent or defendant-respondent."	Art. 175C. Death of defendant or respondent.

[Art. 175A is now substituted for art. 171 of Act XII of 1879 ; art. 175B for art. 171A ; and art. 175C for art. 171B of the same Act. See the foot-note.

Arts. 175A and 175B refer to cases where the plaintiff or appellant is dead. Art. 175C to cases where the defendant or respondent is dead. There is now no doubt that these articles apply to *appeals* whether the appellant is the plaintiff or the defendant. (As to the *old* law, see *In re* Ram, 3 C. L. R., 440). The repealed articles did not, and the new articles do not, apply to cases where the *Court* may, of its own motion, cause the legal representative of one of *several* *plaintiffs* to be made a party under sec. 363 as amended by Act VII Sec. 363 of the Code.

171.—Under section 363 or 365 of the Code of Civil Procedure, by a person claiming to be the legal representative of a deceased plaintiff *or appellant.*	Sixty days	... The date of the plaintiff's or *appellant's* death.	*Repealed* article corresponding to new art. 175A.

[The words "or appellant" in art. 171, and arts. 171A, 171B and 171C, were added by Act XII of 1879. As to the state of the law at the time of this enactment, see *In re* Ram Sunkur, 3 C. L. R., 440 ; Khusalbhai *v.* Kabhai, I. L. R., 6 Bom., 26 ; Bhoyrub *v.* Domun, I. L. R., 5 Calc., 139, and p. 186, *supra.*

These articles referred to *certain* applications under Chap. XXI of the Civil Procedure Code. Art. 171 referred to an application made *by* the legal *representative* of a deceased *plaintiff* to *get himself substituted* in the place of the deceased on the record. None of these articles referred to sec. 364 (now repealed) of the Civil Procedure Code. Art. 171A dealt with an application *by* the *defendant* to *bring* in the legal *representative* of the deceased *plaintiff*, supposing no application had been made by such representative under the preceding article. Art. 171A probably included an application by the defendant for an *award of costs* under sec. 366. Art. 171B referred to an application *by* the *plaintiff* to substitute the legal *representative* of a deceased *defendant* in the place of the deceased on the record. Art. 171C applied to an application *by the legal representative* of the deceased (or insolvent) *plaintiff* to set aside an order for abatement under sec. 366, (or an order of dismissal under sec. 370), of the Procedure Code.

An application by the representative of a deceased *defendant* or *respondent* to get *himself* substituted or added as a party to the suit or appeal was not governed by any of these four articles. The Code of Civil Procedure itself did *not* (*before* Act VII of 1888) expressly provide for such an application.

An application under sec. 372 of the Civil Procedure Code was governed by art. 178. (Benode *v.* Sharat, I. L. R., 8 Calc., 837, 844). As to what applications for the substitution or addition of parties, sec. 372 applies, see

Sec. 372.

of 1888 (see Oriental Bank *v.* Charriol, I. L. R., 12 Calc., 642); nor to cases (under sec. 372) of assignment, creation or devolution of interest pending the suit, *other* than the cases of death, marriage, or insolvency mentioned in the preceding sections of the Code. (See Benode *v.* Sharat, I. L. R., 8 Calc., 837, and cf. Rajaram *v.* Jibai, I. L. R., 9 Bom., 151, and Jumnadas *v.* Sorabji, I. L. R., 16 Bom., 27). See other cases in the foot-note. The view of the learned Judges in Benode *v.* Sharat, that where an *interest in property, devolved* on the death of one of the parties to the suit, sec. 372 (and not secs. 365—368) of the Code applied to the case has been expressly dissented from by the Allahabad High Court, and the Punjab Chief Court. (See 10 Weekly Notes, 21; Punj. Rec. No. 76 of 1884; Rivaz, 4th Ed., 250).

Benode *v.* Sharat, 8 Calc.

Court's power under sec. 363.

Where one of *several* plaintiffs dies, and the right to sue survives to the surviving plaintiffs *and* the legal representative of the deceased plaintiff, the *Court may* cause the latter to be made a party and proceed with the case. If the *surviving plaintiffs* make an application for bringing in the legal representative of the deceased plaintiff, such application is not governed by art. 175A. Art. 178 may apply to such an application. As to the applicability of art. 178 to cases where these articles do not apply, see Benode *v.* Sharat, I. L. R., 8 Calc., 837; Lakshmi *v.* Sri Devi, I. L. R., 9 Mad., 1; Ram *v.* Ram, I. L. R., 10 All., 270.

Gocool *v.* Administrator-General, I. L. R., 5 Calc., 726, 731; Rajaram *v.* Jibai, I. L. R., 9 Bom., 151; and Benode *v.* Sharat, I. L. R., 8 Calc., 837. In some respects, Benode *v.* Sharat has been expressly dissented from in Allahabad and in the Punjab. (See Rivaz, 4th Ed., 250).

Sec. 582 of Act XIV of 1882 enacted that the words 'plaintiff,' 'defendant' and 'suit' in secs. 363, 365, 366, 368, 371, and other sections of Chap. XXI of the *Code*, shall be held to include an *appellant*, a *respondent*, and an *appeal* respectively. But it was held in several cases that the word "defendant," in arts. 171A and 171B of the *Limitation* Act did *not* include a "respondent." (Uditnarain *v.* Huroguri, I. L. R., 12 Calc., 590, F. B.; Balkrishna *v.* Baljoshi, I. L. R., 10 Bom., 663; Lakshmi *v.* Sri Devi, I. L. R., 9 Mad., 1; Debedin *v.* Chunnalal, I. L. R., 10 All., 264, F. B.) Sec. 582 as amended by Act VII of 1888, now enacts that the word "plaintiff" in Chap. XXI of the Code, shall be held to include a plaintiff-appellant, or defendant-appellant; the word "defendant" a plaintiff-respondent or defendant-respondent, and the word suit an appeal. Arts. 175A, 175B, 175C and art. 171 of the Limitation Act as amended by Act VII of 1888, *do* now apply to proceedings arising out of the death or insolvency of parties to an *appeal*. Before Act XII of 1879, the corresponding articles did not apply to either appellants or respondents. After Act XII of 1879 they, or rather one of them, *viz.*, art. 171, applied to applications under sec. 365 by the appellant.

Art. 171 did not apply to cases where the original plaintiff or appellant died after the determination of the suit or appeal. (*See* I. L. R., 3 Mad., 236, and Cally Churn *v.* Bhuggobutty, 5 C. L. R., 108). When the plaintiff died after the suit had been decided by the first Court, his legal representative might (with the permission of the Appellate Court) prefer an appeal within the usual period. (Ramananda *v.* Minachi, I. L. R., 3 Mad., 236; Moharanee *v.* Lochman, 2 Sev., 892). An application by the legal representatives of a deceased decree-holder to continue execution-proceeding was not governed by this article. (Gulabdas *v.* Lakshawan, I. L. R., 3 Bom., 221; Dulari *v.* Mohun Sing, I. L. R., 3 All., 759, 764). The law in this respect is still the same.]

Appeal how preferred if party dies after decree.

Repealed article corresponding to new art. 175B.

171A.—Under sec. 366 of the same Code by the defendant.	Sixty days	...	*The sixtieth day from* the date of plaintiff's death.

[*See* notes to art. 171 and art. 171B. If the defendant did apply, he was under this article required to do so within sixty days from the

An application by the legal representative of a *deceased defendant* (or respondent) to have *himself* made a party, under sec. 368 as amended by Act VII of 1888, may come under art. 175C. Art. 171B of the old law did *not* apply to applications by the legal representatives of deceased defendants or respondents to get *themselves* substituted in the place of the deceased. It was held that art. 178 was *then* applicable to such applications. (See Ram Sarup *v.* Ram Sahai, I. L. R., 10 All., 270, F. B.) But sec. 368 itself speaks only of an order for *abatement* being passed on the *failure of the plaintiff* (or appellant) to make an application for bringing in the legal representative of the deceased defendant (or respondent). No penalty is expressly attached to the *failure of the defendant* (or respondent) to make an application. It is somewhat different in the case of a defendant (or respondent) applying under sec. 366. It is *expressly* enacted that the Court *may* on application by defendant (or respondent) pass an order for proceeding with the suit in the absence of the legal representative of the *deceased plaintiff* (or appellant).

Who are *bound* to apply for substitution.

The defendant or respondent may make an application for substitution under sec. 366 of the Code, in the case of the death of a sole plaintiff or sole appellant; and the legal representatives of a deceased defendant or respondent may make an application for substitution under sec. 368 in the case of the death of any defendant or respondent. No penalty, however, is attached to their failure to do so. But the failure of the *plaintiff* or *appellant* or of *his* legal representative to apply for substitution may cause the suit or appeal to abate under secs. 366 and 368 of the Code.

No penalty to defendant's (or respondent's) failure to apply.

Arts. 175A, 175B and 175C, do not apply to cases of death *after* the suit or appeal has *determined*. (Cally Churn *v.* Bhuggobuty, 5 C. L. R., 108). As to a party dying *after* the decree, but before preferring an appeal, see Ramanadu *v.* Minatchi, I. L. R., 3 Mad., 236. An application by the legal representative of a deceased decree-holder to continue *execution* proceedings is not governed by these articles. (Gulabdas *v.* Lukshman, I. L. R., 3 Bom., 221; Kalyanbhai *v.* Ghanasamlal, I. L. R., 5 Bom., 29).

Death after decree.

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expiration of the time ordinarily allowed by art. 171 to the legal representative of the deceased *plaintiff* (or appellant). No *respondent* was bound to apply under this article. The *italicised* words in this article were by a clerical error, omitted in Act XII of 1879. The error was corrected by Act VIII of 1880, see p. 525, *supra*.]

171B.—Under sec. 368 of the same Code, to have the representative of a deceased defendant made a defendant.	Sixty days	... The date of the defendant's death.	*Repealed* article corresponding to new art. 175C.

[*See* the notes to art. 171. Applications by plaintiffs were governed by this article. No *appellant* was bound to apply to have the representative of a deceased *respondent* made a respondent. This article, it was held, did not apply to an application by the plaintiff to enter the name of the representative of the defendant in the register of the suit in the place of that of the defendant who had died *after* a decree for partition had been obtained, but before the usual commission for partition was issued. (Kedar Nath *v.* Harra Chand, I. L. R., 8 Calc., 420). This article did not apply where the original defendant, named by the plaintiff in his application to sue as a *pauper*, died *before* such application was registered as a *suit*. (Janardin *v.* Anant, I. L. R., 7 Bom., 373).

If, on the death of the defendant, no application was made by the plaintiff within the period allowed by this article, the suit abated, *unless he satisfied the Court that he had sufficient cause for not making the application within such period*. (*See* sec. 368, Act XIV of 1882). The representative of the

Notwithstanding sec. 647 of the Code of Civil Procedure, these articles do not apply to *execution-proceedings*. (See Stowell *v.* Ajudhia, I. L. R., 6 All., 255, at p. 259 ; sec. 4, Act VI of 1892, Thakur *v.* Fakir, I. L. R., 17 All., 106). Nor to applications to sue *in forma pauperis*. (See Janardin *v.* Anant, I. L. R., 7 Bom., 373).

Sec. 5. See the notes under art. 171 in the text. The provisions of sec, 5 of the Limitation Act, applicable to appeals, are applicable to applications under secs. 365, 366, 368 and 371 of the Code. (See sec. 372A, Civil Procedure Code).

Sec. 7. Even if one of the legal representatives is a minor, he may take advantage of the provisions of sec. 7, and his application will prevent the suit or appeal from abating. (Bhikaji *v.* Puroshotam, I. L. R., 10 Bom., 220).]

Art. 176.	176.—Under the Code of Civil Procedure, sec. 516 or 525, that an award be filed in Court.	Six months ...	The date of the award.

Arbitrator's award. [When a matter in dispute has been referred to arbitrators by the Court, and an award has been made, the correct procedure for the arbitrators is to return the record with the award to the Court itself. (Maharaja Sir Joy Mungul *v.* Mohun Ram, 12 W. R., 397). The act of an arbitrator, in handing an award to the proper officer of the Court to be filed (under sec. 516 of the Code), is not an *application* within the meaning of this schedule. (Robarts *v.* Harrison, I. L. R., 7 Calc., 333). The first portion of this article probably applies to an application by any of the *parties* to get the award filed by the arbitrators. (See p. 186, *supra*).

When any matter has been referred to arbitration *without the intervention of a Court of Justice*, any person interested in the award of the arbitrators may (under sec. 525 of the Code) *apply* to a competent Court that the award be filed. The date of the award is the date when it is given to the parties by the arbitrators. It would be unreasonable to hold that the day written on the award, as when it was made, was the date from which limitation commenced to run. (See Dutto Sing *v.* Dosad, I. L. R., 9 Calc., 575 ; and p. 193, *supra*).]

Art. 177.	177.—For the admission of an appeal to Her Majesty in Council.	Six months ...	The date of the decree appealed against.

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deceased defendant might *himself* come in within three years under art. 178 ; so also might the representative of a deceased *respondent* whether plaintiff or defendant. (Ram Sarup *v.* Ram Sahai, I. L. R., 10 All., 270, F. B.).]

Repealed art. corresponding to new art. 171.	171C.—Under sec. 371 of the same Code, for an order to set aside an order for abatement or dismissal.	Sixty days ...	The date of the order for abatement or dismissal.

[See the notes to arts. 171 and 171B. The application under sec. 371 of the Code is made by the legal representative of the plaintiff (or appellant to set aside an order of abatement passed under sec. 366 on the death of the original plaintiff (or appellant). If an order for abatement is passed on the death of the defendant (or respondent), under sec. 368, it cannot be set aside under sec. 371. In the case of plaintiff's insolvency, an order for abatement is called an order for *dismissal*. (*See* sec. 370 of the Code).

Before the passing of Act XII of 1879, art. 178 governed applications under sec. 371. (Bhoyrub *v.* Domun, I. L. R., 5 Calc., 139). Art. 171 in the text has been now substituted for art. 171C of Act XII of 1879.]

[A petition presented in time and admitted, if struck off for default, may be *re-admitted* after the six months. (*In re* Radha Benode Misser, B. L. R., F. B., 730).

An application under sec. 598 of the Civil Procedure Code falls within this article. The limitation for such an application was provided by sec. 599 of Act X of 1877, until that section was repealed by the present Limitation Act. The *period* of limitation, however, remained the same. Sec. 599 was restored to its former place by Act XIV of 1882. According to a dictum of Stuart, C. J., sec. 599 of Act XIV of 1882 must be taken to have repealed art. 177 of Act XV of 1877, although, perhaps, that was not the intention of the Legislature. (Fazal-un-nissa *v.* Mulo, I. L. R., 6 All., 250, 251). In 1887, Kernan and Ayyar, JJ., considered *both* art. 177 of Act XV of 1877 and sec. 599 of Act XIV of 1859 applicable to applications for the admission of an appeal to Her Majesty in Council. (Lakshmanan *v.* Peryasami, I. L. R., 10 Mad., 373). It was *expressly* declared by sec. 599 that if the period of six months expired when the Court was closed, the application (to the Court whose decree was complained of) might be made on the day the Court re-opened. *Other* provisions of the Limitation Act were not referred to in that section. Act VII of 1888 has again repealed sec. 599 of Act XIV of 1882. This bare repeal of the (supposed) repealing sec. 599 of Act XIV of 1882 cannot revive art. 177, if it was repealed by that section. (See cl. 1, sec. 3 of the General Clauses Act, I of 1868). It has now been held by Edge, C. J., and Tyrell, J. (*In re* Sita Ram, I. L. R., 15 All., 14) that sec. 599 of Act XIV of 1882 was not inconsistent with art. 177, that sec. 599 of Act XIV could not be taken to have repealed art. 177 of Act XV of 1877, that art. 177 was in force *before* Act VII of 1888 came into operation, and that it was not necessary to *revive* it. The provisions of cl. 1, sec. 5 and those of sec. 7, Act XV of 1877, were and are still applicable to applications for the admission of an appeal to Her Majesty in Council. (*In re* Sita Ram, I. L. R., 15 All., 14, at p. 17). If art. 177 had been repealed, art. 178 would have applied to applications provided for by the former article. (*Ibid.*) Art. 177, and secs. 598, 599 of the Code.

The third division of Schedule II is headed "Applications" as distinguished from the second division which is headed "Appeals." Art. 177 which appears in the third division deals with applications as distinguished from appeals. (Moroba *v.* Ghanasham, I. L. R., 19 Bom., 301). Sec. 5, cl. 2 (as to extension of time for sufficient cause) and sec. 12, cl. 2 (as to exclusion of time, requisite for obtaining a copy of the decree) do not apply to *applications* under this article. (Lakshmanan *v.* Peryasami, I. L. R., 10 Mad., 373; Anderson *v.* Periasami, I. L. R., 15 Mad., 169; *In re* Sita Ram, 15 All., 14; and Moroba *v.* Ghanasham, I. L. R., 19 Bom., 301. See also pp. 575, 601, *supra*). Appeals, and applications for leave to appeal.

As to when security for the costs of the respondent may be given, and the amount required to defray the expense of translating, transcribing, indexing and transmitting a copy of the record to England, may be deposited, see sec. 602 of the Code, and pp. 184 and 574, *supra*. The Court *has power* to enlarge *this* period. But granting leave to appeal to the Privy Council, although no application for leave was made within the time prescribed by the Limitation Act, is *ultra vires*. (Gujadhar *v.* Widows of Ali Beg, 15 B. L. R., 221).] Security for costs.

178.—Applications for which no period of limitation is provided elsewhere in this	Three years ...	When the right to apply accrues.	Art. 178.

schedule, or by the Code of Civil Procedure, sec. 230.

[Act XIV of 1859 or Act IX of 1871 had no provision which corresponded to art. 178 of Act XV of 1877.

Applications in suits under the Code.

Although arts. 162—164, 166—170, 172, 173, 175 and 177 do not *in terms* refer to the Code of Civil Procedure, an examination of all the articles relating to 'applications' in this schedule shows that the applications therein contemplated are such as are made under some section of the *Civil Procedure Code*. (Baimanekbai *v.* Manikji, I. L. R., 7 Bom., 213; Empress *v.* Ajudhia, I. L. R., 10 All., 350). In the case of Ishan Chunder Roy, I. L. R., 6 Calc., 707, it was said that every *other* article in this division of the schedule specifically related to some case *pending* or *already decided*. This statement is strictly correct, except, so far as an application under sec. 525 of the Code (see art. 176) is concerned. It has been held that the *general* words in art. 178 must be construed with some *limitation* with reference to the words they follow. (Govind *v.* Rungomoney, I. L. R., 6 Calc., 60). The application referred to in art. 178 must be an application *ejusdem generis* with the applications already specified. (See p. 236, *supra*). Art. 166 of Act IX of 1871 expressly referred to an application for the execution of a decision of a *Revenue Court*. There is no corresponding article in Act XV of 1877. It is apprehended that even art. 178 does not apply to such applications except where they may be made under the Code of Civil Procedure.

Applications for certificate, probate, letters, foreclosure, revocation of probate, invalidating patent, &c.

Art. 178 does not apply to an application by which a miscellaneous proceeding (as opposed to a regular suit) is *initiated*, such as an application for the custody of minors under Act IX of 1861 or for a certificate of administration under Act XL of 1858 (now replaced by Act VIII of 1890) or under Act XXVII of 1860 (now replaced by Act VII of 1889) or an application for probate or letters of administration (I. L. R., 6 Calc., 707; I. L. R., 7 Bom., 213; see also Jauki *v.* Kesovalu, I. L. R., 8 Mad., 207; Kashi *v.* Gopi, I. L. R., 19 Calc., 48); or an application to the District Court for the purpose of foreclosing a mortgage under Beng. Reg. XVII of 1806. These applications are not made under the Code of Civil Procedure, and are not *ejusdem generis* with the applications specified in the schedule. An application for probate or letters of administration, though treated as a suit under the Code of Civil Procedure, is not such an application under the Code, nor is an application for revocation of probate such an application. (Gnanmutru *v.* Vana, I. L. R., 17 Mad., 379; Kashi *v.* Gopi, I. L. R., 19 Calc., 48). In England also, there is no limitation as to time in requiring a will to be proved in solemn form. (In the Goods of Tapping, 2 Robert, 620; Powles and Oakley, 3rd Ed., p. 367). Art. 178 is also inapplicable to an application under Act XV of 1859 (now replaced by Act V of 1888) for declaring the invalidity of a patent. (See In the matter of Moses, I. L. R., 15 Calc., 244, 246).

For an order absolute.

An application for an order absolute for the sale of mortgaged property under sec. 89 of the Transfer of Property Act, 1882, is also not governed by this article. (Ranbir Sing *v.* Drig Pal, I. L. R., 16 All., 23. See also Ajudhia *v.* Baldeo, I. L. R., 21 Calc., 818, at p. 824). So also an application for an order absolute for foreclosure. (Tallapa *v.* Dattu, 5 Cent. Prov. L. R., 61).

Court's power not restricted.

The proceeding to which art. 178 is applied must amount to an *application* by a *party* to a *civil suit*, and must not have been *specially* provided for, elsewhere. Art. 178 does *not* restrict the *Court's power* to add a party defendant under sec. 32, or the legal representative

of one of the plaintiffs under sec. 363, or to amend a decree under sec. 206 of the Code. (*Oriental Bank* v. *Charriol*, I L. R., 12 Calc., 642, 650 ; *Raghunath* v. *Raj*, I. L. R., 7 All.. at p. 280) It is the *duty* of the Court to amend its own decree under sec. 206, *whenever* it is found to be not in conformity with its judgment. (*Shivapa* v. *Shivapanch*, I. L. R., 11 Bomb., 284 ; *Jivraji* v. *Pragji*, I. L. R., 10 Mad., 51; *Kalu* v. *Latu*, I. L. R., 21 Calc., 259.) When there has been an appeal against the decree of the first Court, and a decree has been passed thereon, the first Court has *no* longer any *power* to amend its decree, although it has not been in any way modified by the decree of the Appellate Court. (*Pichuvayyangar* v. *Seshayyangar*, I. L. R., 18 Mad., 214, F. B) But where the Court *has a power* to act at any time either upon or without application, such power may be exercised even if an application is made by a *party* after the limited time. (*Sohna* v. *Khalak*, I. L. R., 13 All., 78, at p. 85.) The act of an arbitrator in handing in an award to the proper officer of the Court under sec. 516 of the Civil Procedure Code is *not* an *application*. (*Roberts* v. *Harrison*, I. L. R., 7 Calc., 333.) Art. 178 does not apply to applications for sanction under sec. 195 of the *Criminal* Procedure Code, 1882. (*Queen-Empress* v. *Ajudhia Sing*, I. L. R., 10 All., 350.) An application for a fresh summons to a defendant is *specially* provided for by sec 99A of the Code. Such application must be made within one year from the date of the *Nazir's* (not bailiff's) return of non-service. (*Parsotam* v. *Abdul*, I. L. R., 13 Bomb., 500.)

Amendment of decree.

Handing in an award.

For sanction, Cr. P. Code.

Sec. 99A Civ. P. Code.

The application under art. 178 must be further an application for the exercise by the Court of powers which it would *not* be *bound* to exercise *without* such application. The article does not apply to applications to the Court to do what it has *no discretion to refuse*, nor to applications for the exercise of functions of a *ministerial* character. (*Kylash* v. *Rammassami*, I. L. R., 4 Mad., 172 ; *Vithol* v *Vithojirao*, I. L. R., 6 Bom., 586 ; *Durbo* v. *Kesho*, I. L. R., 9 All., 364.)

For what Court cannot refuse, or what is ministerial.

As the Code of Civil Procedure *imperatively* requires the Court to grant to the purchaser a *certificate* of sale after the sale has been duly confirmed, an application by the purchaser to set the Court in motion to discharge its *duty* by executing and delivering such certificate is not governed by this article. (*Kylash* v. *Ramsami*, I. L. R., 4 Mad., 172 ; *Vithul* v. *Vithojirav*, I. L R, 6 Bomb., 586.) A fresh or duplicate certificate may be issued at any time. (*Dwidas* v. *Pirjada*, I. L. R., 8 Bomb., 377 ; *In re* Lakshman, I. L. R., 9 Bomb., 472.) The grant of a certificate is hardly an act of a *judicial* character. An application to the Court by one of the parties to a suit, after it has been tried, to "pronounce judgment," or by a party to an award after it has been filed in Court, to "pass judgment according to the award," is not governed by art. 178. (*Ishwar Das* v. *Dosibai*, I. L. R., 7 Bomb., 316) There is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time, asking the Court to proceed to judgment. (*Puran* v. *Roy Radha*, I. L R., 19 Calc., 132 at p 138. F. B) Proceedings for ascertaining the amount of mesne profits awarded by a decree in accordance with the provisions of sec. 211 or 212 of the Code of Civil Procedure are not proceedings in execution of a decree in regard to any fixed sum, but merely a *continuation* of the original suit. (See *Dwarka* v. *Borinda*, I. L. R., 22 Calc., 425 at p. 433) The Court is *bound* on the *oral* application of the plaintiff, indeed *without* any application for the ascertainment of the mesne profits, to proceed to determine the amount. If the plaintiff makes an application, his application is

For certificate of sale.

To pass judgment.

To ascertain amount of mesne profits.

an application in a *pending suit*, and is not governed by art. 178 or 179. (*Puran* v. *Roy Radha*, I. L. R, 19 Calc., 132, 138, F. B.)

Actually making *partition* or taking *accounts*.

The same principle is applicable to an application for effecting an *actual* partition after the interlocutory or preliminary decree declaring and determining the *rights* of the parties. An application to have the partition effected by an arbitrator or commissioner is an application in a *pending* suit, and the Court is *bound* (even if no application is made) to make a final decree after appointing a commissioner for the purpose of effecting an actual partition by metes and bounds. (*Dwarka* v. *Barina*, I. L R, 22 Calc., 425) An interlocutory order in a suit for accounts directing that such accounts be taken though appealable (*Rahimbhoy* v. *Turner*, I. L. R., 15 Bomb., 155, P. C.) has also to be *completed* by the *Court* by the appointment of a commissioner under sec. 394 of the Code of Civil Procedure As to *incomplete* redemption or foreclosure decrees, see p. 852 *supra*.

Redemption, foreclosure, or sale.

An application for an *order absolute* for sale under sec. 89 of the Transfer of Property Act, not being an application under the Code of Civil Procedure, is not governed by art. 178. (*Ranbir* v. *Drigpal*, I. L. R., 16 All., 23.) As to conditional decrees for sale, see p. 879 *infra*.

Amendment of decree.

An application to amend a decree under sec. 206 of the Code does not fall under this article. Though it is an application under the Code of Civil Procedure, the Court is *bound* of its own motion or on that of any of the parties to correct clerical or arithmetical errors in the decree or to bring it into conformity with the judgment. (*Shivapa* v. *Shivpauch*, I. L. R., 11 Bomb, 284; *Darbo* v. *Kesho*, I. L. R., 9 All., 364; *Tarsiram* v. *Mansing*. I. L. R., 8 All., 492; *Sevaji* v. *Tragji*, I. L. R, 10 Mad., 51; *Kalu* v. *Latu*, I. L. R., 21 Calc., 259.) *Gaya Purshad* v. *Shikri*, I. L. R., 4 All, 23, has, on this point, been virtually overruled. (*Seesohna* v. *Khadak*, I. L. R., 13 All., 78 at p. 85).

Certain applications in a *pending* suit do not come under art. 178.

It has been further held that this article does not apply to an application to re-constitute a suit and restore it, when after the decree a reference is ordered, but the case is struck out of the reference list for want of prosecution. The article was not intended to govern every application to the Court in reference to its own list, such as an application to transfer a case from one board to another, to transfer a case to the bottom of the board or for change of attorneys, or so forth. (*Govind* v. *Rungomoney*, I. L. R., 6 Calc, 60.) A right to apply for the *revival* of a suit for partition, which had been decreed against the original defendant, who died after the decree, but before the usual commission for partition, had been issued, is a right which accrues from day to day and is not barred by any limitation. (*Kedar* v. *Harra*, I. L. R., 8 Calc, 420.) An application to have a partition ordered by the Court, effected by the appointment of a commissioner under sec. 396 of the Code, is not governed by art. 178 or art. 179. (*Dwarka* v. *Barinda*, I. L. R., 22 Calc., 425.)

Application for delivery of possession.

As the Court is *not bound* to put an execution purchaser into *possession* until such purchaser makes an application to the Court under sec. 318 or 319 of the Code, such application is governed by art. 178. The three years are to be computed from the date of the issue of the certificate. (*Barsapa* v. *Morya*, I. L. R., 3 Bom, 433; *Hanmantrao* v. *Subaji*, I. L R, 8 Bomb, 257; *Kashinath* v. *Duming*, I. L. R., 17 Bomb., 228) Limitation runs from the date of the *first* certificate. (Branson's Digest of unreported Bombay judgments, 208. But cf. I. L. R., 9 Bomb, 472.) The lapse of the three years does not extinguish the applicant's *right*. He may bring

a regular suit within 12 years. See notes under arts. 137 and 138. If the *decree-holder* or his assignee purchases the judgment-debtor's property in execution, *his* application for delivery of possession is according to Best, J., an application in execution, and is governed by art. 179. (*Muttia* v. *Appasami*, I. L. R., 13 Mad, 504 at p 507.) But see I. L. R., 17 All., 222, 224; and 1 Mad., L. J. 215.

Sec. 372.

An application under sec. 372 of the Code, not having been specially provided for, is governed by art. 178. (*Benode* v. *Sharat*, I. L R., 8 Calc., 837.)

Decree-holder's representative.

An application by the legal representative of a *decree-holder* for the entry of his name in the place of that of the decree-holder is governed by this article. The three years are to be computed from the time of the death of the decree-holder, except where the execution was stayed at the time by an injunction. (*Shivram* v. *Narayan*, I. L R., 5 Bomb., 29.)

Over-payment by judgment-debtor.

An application by a judgment-debtor, asking the Court to ascertain and determine how much the judgment-creditor has been overpaid, is probably governed by this article. Such an application is not an application for *execution* within the meaning of art. 179. (See *Muthoora* v *Mohunt*, 22 W. R., 211; *Mula Raj* v. *Debi*, I. L. R., 7 All., 371.)

Amount of mesne profits.

It had been held that an application by a decree-holder to make a decree complete by *ascertaining* the *amount* of mesne profits payable by the debtor was governed by art. 178 (*Anando* v. *Anando*, I. L. R., 14 Calc, 50.) The three years, it was held, might be computed from the date, at the *latest*, of the *delivery of possession* of the lands decreed. (*Ibid.*) The right to apply evidently accrues at the date of the decree, unless the decree directs that the plaintiff shall recover mesne profits up to the date of the recovery of possession. (Cf. *Baroda* v. *Fergusson*, 11 C. L. R., 17; *Hemchunder* v. *Brojosundary*, I. L. R., 8 Calc., 89.) As to when a decree becomes a *complete* decree, see *Dildar Hossein* v. *Mujudunnissa*, I. L. R., 4 Calc., 629; *Krishnan* v. *Nilakandan*, I L. R, 8 Mad., 137. But the case of *Anando* v. *Anando*, I. L. R., 14 Calc, 50, has been overruled by the Full Bench, and applications for the ascertainment of mesne profits in such cases have been held to be governed neither by art. 178 nor by art. 179. (See *Puran* v. *Roy Radha*, I. L. R., 19 Calc., 132 F. B., and pp. 877-8, *supra*.)

F. B. Ruling.

Refund.

An application by the judgment-debtor for refund of monies levied in execution of a decree subsequently reversed on appeal, being an application to enforce a claim to *restitution* under sec. 583 of the Civil Procedure Code, is governed by art. 178. (See *Kurupam* v. *Sadasiva*, I. L. R, 10 Mad., 66. See also *Narayana* v. *Narayana*, I L. R., 13 Mad., 437 at p. 440) An application for a refund of the excess amount of costs of execution paid to the sheriff in anticipation of the costs being taxed is governed by art. 178 (*Khettu* v. *Kassy*, I. L. R., 20 Calc., 899.) An application by the auction purchaser for refund of the purchase-money under sec. 315 of the Code is governed by art. 178. (*Girdhari* v *Sital*, I L R., 11 All., 372.) Where a pre-emptor is not willing to pay the amount of pre-emption-money or price as *increased* by the Appellate Court, he may apply for a refund of the smaller amount already paid by him. (*Nana Ram* v. *Sita Ram*, I. L R, 8 All., 545.)

Conditional decree for sale.

It has been held by the Allahabad High Court that where a decree expressly provides that the decree-holder shall not apply for execution till after the expiration of a certain period from its date (*e.g.*, where

a mortgage decree provides that if a certain sum of money is not paid within four months, the decree may be executed by the sale of the mortgaged property), art. 178 applies to an application for the execution of such a decree. (*Thakurdas* v. *Shadilall*, I. L. R., 8 All., 56.) This case has been approved in *Muhammad* v. *Muhammad*, I. L. R., 16 All., 237; but Mr Starling thinks that art. 179, cl 6, applies to such a decree. (3rd ed., pp., 348, 385.)

Decree incapable of execution.

Where a decree, as originally framed, was found to be absolutely incapable of execution, and was not finally amended so as to become capable of execution until nearly 12 years after it was passed, art. 178 was applied to the first application for execution of the amended decree. (*Muhammad* v. *Muhammad*, I. L. R., 17 All., 39.)

Conditional decree for possession.

An application for the execution of a decree for *possession* of immoveable property where the decree-holder cannot execute the decree unless the judgment-debtor makes any default in paying a certain annuity is not governed by cl. 6, art. 179, but by art. 178. (*Muhammad* v. *Muhammad*, I. L. R., 16 All., 237.)

Decree for perpetual injunction.

Where a decree awards a perpetual injunction, application for execution of the decree (under art. 178) must be made within 3 years from the time when the defendant first acts contrary to such decree, (*Sadagoha* v. *Krishnama*, I. L. R., 12 Mad., 356 at p. 364.)

Rescinding leave.

An application to rescind the leave given to bring a suit under the Letters Patent is governed by this art. (*Kessowji* v. *Luckmidas*, I. L. R., 13 Bom., 404.)

Application for *revival* of previous application for execution, after removal of obstacle.

An application to revive a previous application for execution, which had been temporarily suspended by an *injunction* or by reason of an order under sec. 280 of the Code or *other obstacle*, is now (according to the Allahabad, Bombay and Calcutta High Courts) governed by this article. The three years are to be computed from the date on which the injunction or other obstacle is removed. (*Kalyanbhai* v. *Ghanasham*, I. L. R., 5 Bom., 29; *Buti* v. *Nehal*, I. L. R., 5 All., 460; *Paros Ram* v. *Gardner*, I. L. R., 1 All., 355 F. B.; *Basant Lal* v. *Batul Bibi*, I. L. R., 6 All., 23.) The same rule has been applied to cases where the judgment-debtor's unsuccessful attempt to set aside an *ex-parte* decree *prevented* the judgment-creditor from proceeding with his application for execution. (*Chundra* v. *Gopi*, I. L. R., 14 Calc., 385; *Baikanta* v. *Aughore*, I. L. R., 21 Calc., 387 at p. 391. See also *Chintaman* v. *Balshastri*, I. L. R., 16 Bom. 294; *Musst. Eshar* v. *Ghasita*, Punj. Rec. No. 168 of 1883; Rivaz, 4th ed., 258.) Where the *sale* of the attached property is suspended pending the decision of a suit brought by an unsuccessful *objector* under sec. 283 of the Code, an application to revive the suspended proceedings (after the dismissal of the objector's suit) should be regarded as an application in a *pending* proceeding, the right to make which would accrue from day to day. If a formal application to bring the attached property to sale were necessary, art. 178 would apply, and the three years would be counted from the date of the dismissal of the objector's suit. (See *Phiraya* v. *Adu*, Punj. Rec. No. 179 of 1882; Rivaz, p. 258.) The same principle is applicable to cases where the sale of attached property is suspended by reason of the property being placed under the management of the Court through a Receiver. (*Chowdhry Paroos* v. *Koli*, I. L. R., 17 Calc., 53.) In *Booboo Payroo* v. *Syud Nazir Hossein*, 23 W. R., 183, decided under the *old* law, Mr Justice Markby threw out a vague suggestion that the decree-holder might loose his remedy if he were *dilatory or*

negligent in pursuing it *after* the *removal* of the obstacle. Art. 178 *now* prescribes a *definite* period. If the decree-holder's attempt to remove the obstacle (by regular suit or otherwise) is *unsuccessful*, and he subsequently applies to execute the decree by attaching *other* property, or by selling that portion of the property already attached to which *no objection* had been raised by any claimant, the subsequent application cannot be treated as an application to revive a previous one, and is not governed by art. 178. (*Rughoonandan* v. *Bhugoo*, I. L. R., 17 Calc., 271.) All the High Courts, including the Madras High Court, agree in holding that an application is not saved from the bar of limitation by reason of an *unsuccessful* suit or other attempt to remove an obstacle to the execution of a decree. According to the Madras High Court, even a successful suit to remove the obstacle is not sufficient. In *Narayana* v. *Pappi*, I. L. R., 10 Mad., 22, it has been held by the Madras High Court that *all* applications for *execution* are governed by art. 179, and that a second application to attach property which had been released as not liable to attachment under the decree, can *not* be treated as a revival of the first application; so that the second application must be held to be barred if not made within the three years allowed by art. 179. The time occupied by a regular suit to establish the right to attach the property cannot, according to the Madras High Court, affect the question of limitation

Different view of the Madras High Court.

An application to re-execute a decree which had been previously satisfied, on the ground that the decree-holder has been obliged to *refund* the money which had been realised in the first execution, is not *necessarily* governed by art. 178. It cannot be treated as a revival of the first application where the decree-holder wishes to take out a process which he did not apply for when he first executed the decree. (*Virasami* v. *Athi*, I. L. R., 7 Mad., 595. Cf. *Issuri* v. *Abdool*, I. L. R., 4 Calc., 415. And see notes to cl. 4, art. 179.)

For re-execution and a *new* process.

Where it was understood between the parties, when an application for execution of 1877 was struck off, that if negotiations failed, they should present a fresh application, such fresh application must be regarded as an application for the *revival* of the old execution proceedings. (*Venkatrav* v. *Biji Sing*, I. L. R., 10 Bomb., 109.)

Failure of negotiations.

An application by Government or the Secretary of State for India in Council (*e. g.*, an application for the recovery of court fees in successful pauper suits, under sec. 411 of the Code) is not exempted from the operation of art. 178 or of any other article in this Division of the Schedule. (*Appaya* v. *The Collector*, I. L. R., 4 Mad., 155.)

Government not exempted.

It has been held by a Division Bench of the Calcutta High Court, that an application to put up to sale a portion of property, which the applicant has caused to be attached in execution of his decree, is governed by this article, and that the application to sell such property must be disallowed if made more than three years after the date of attachment. (*Joobraj* v. *Buhooria*, 7 C. L. R., 424.) It may be doubted, however, if the right to apply for the sale of property does not accrue from *day to day*, so long as the property remains under attachment. (See Punj. Rec. No. 179 of 1882; Rivaz, 3rd ed., p. 299; *Ambica* v *Sardhari*, I. L. R., 10 Calc., 851; *Chowdhury Paroos* v. *Kali Puddo*, I. L. R., 17 Calc., 53.)

To sell attached property.

Applications to execute *summary* decisions or orders under Act XIX of 1841, sec. 9 of the Specific Relief Act, secs. 280-282 of the Code of Civil Procedure, &c., were formerly governed by the one

Summary decisions.

Sec. 230, Civ. P. C.

year's rule, under sec. 22, Act XIV of 1859, and art. 166 of Act IX of 1871. If art. 179 of Act XV were inapplicable to such cases, they would have been now governed by art. 178.

Sec. 622, Civ. P. C.

Art. 178 may apply to applications to the High Court under sec. 622 of the Code, but such applications will, in the exercise of the Court's discretion, be refused if not made *without delay*. (See *Doorga Pershad* v. *Sheo Churn*, I. L. R., 4 All., 154; *In re* Russick Lall Chatterjee, 15 W. R., 518; *In re* Madhub Chunder Giri, I. L. R., 3 Calc., 243.) In the Calcutta High Court, an application for *revision* under sec. 622 of the Code is generally considered to be too late if presented after the time allowed for an *appeal* to the High Court.

Successive applications for execution, allowed.

The principle that no person shall be allowed to institute successive *suits* on the same cause of action is not applicable to *execution* proceedings. Sec. 230 of the Code of Civil Procedure and cl. 4 (column 3), art 179 of the Limitation Act, evidently contemplate a succession of applications to execute the same decree. (See *Bunko Behari* v. *Nilmadhab*, I. L. R., 18 Calc., 635, at p. 639; *Thakur Persad* v. *Fakirullah*, I. L. R., 17 All., 106, P. C.) Section 230 of the Code puts *some limit* to this succession of applications for the execution of decrees for money or for delivery of property.

Sec. 230, Civ. P. C.

Section 230 of the Code prohibits the grant of a second or later application for execution of a decree after twelve years from the date of the final *decree*, or from the date of the judgment-debtor's *default* where a certain date is fixed by the decree or any subsequent *order of the Court* for the payment of money or the delivery of other property; unless the judgment-debtor has, by fraud or force, prevented the decree from being executed. The effect of this provision is to *cut down* the right of a judgment-creditor to make an *indefinite* number of successive applications for the execution of an unsatisfied decree (*Ashootosh* v. *Doorga Churn*, I. L. R., 6 Calc., 504; *Kunbi* v. *Sesagiri*, I. L. R., 5 Mad., 141.) Even if the second or later application for execution is not barred by the ordinary provisions of the Law of Limitation (art 179), it may be barred by the provisions of sec. 230, provided a previous application for execution had been actually made under *that section*, and such application had been *granted* by the Court under secs. 245, 249, 250 of the Code. (*Dewan Ali* v. *Soroshibala*, I. L. R., 8 Calc., 297. *See* also *Ashootush* v. *Doorga*, I. L. R., 6 Calc., 504; *Anandra* v. *Thakoor*, I. L. R., 5 Bomb., 245; *Ram Kishen* v. *Sidhu*, I. L. R., 2 All., 275; *Byradi* v. *Dassappa*, I. L. R., 1 Mad., 403). If *any* previous application to execute the decree has been *granted*, the limitation prescribed by sec. 230 will be applicable. (*Tileshar* v. *Parboti*, I. L. R., 15 All., 198.) An application, on which only a *notice* under sec. 248 is issued, is not an application *granted* within the meaning of sec. 230. Such an application for execution, though *admitted* by the Court, is not an application *granted* if it is subsequently *struck off*, *without* an order for execution under sec. 249 of the Code. (*Paraga* v. *Bhagwan*, I. L. R., 8 All., 301; *Ramadhar* v. *Ram*, I. L. R., 8 All., 536.) An application for execution is not *granted* within the meaning of sec. 230 until the Court *issues its warrant* for the execution of the decree under sec. 250 of the Code. (*Nilmony* v. *Biressur*, I. L. R., 16 Calc. 744) An application must be treated as *granted*, when an *order* for attachment or arrest has been made, although no person or property is actually arrested or attached. (*Afrunnissa* v. *Sharafutullah*, 9 C. L. R., 321. See also *Patumma* v. *Huse*, I. L. R., 11 Mad., 132.) If the subsequent *application* for execution

Prior application when *granted*.

is *made within* the 12 years allowed by sec. 230, it may be *granted* even *after* the expiration of that period. The words "no subsequent application to execute the same decree shall be granted after the expiry of twelve years" should be read as "no subsequent application to execute the same decree, after the expiry of twelve years, shall be granted." (*Senra Virarama* v. *Annasami*, I. L. R., 6 Mad., 359.)

Sec. 230, Civ. P. C. Subsequent application within time may be granted afterwards.

A previous application for execution made and granted under sec. 230 of the Code of 1877 might make that section of *that* Code applicable to a subsequent application for execution made before its repeal. (*Patumma* v. *Muse*, I. L. R., 11 Mad., 132.) But in order that sec. 230 of the *present* Code might directly apply, a previous application must have been made and granted after the 1st June 1882 when Act XIV of 1882 came into force. (*Annaji* v. *Ramji* I. L. R., 10 Bomb., 348; *Ganapathi* v. *Balasundra*, I. L. R., 7 Mad., 540 at p. 543; *Motichand* v. *Krishnarav*, I. L. R., 11 Bomb., 524; *Chengaya* v. *Appasami*, I. L. R., 6 Mad., 172.)

Sec. 230 of the Code of '77 or of '82.

The *subsequent* application referred to is a substantive application for execution under sec. 230 and according to sec. 235, and not merely an *amending* petition or an application to carry on proceedings already commenced. (*Panaul* v. *Kishenmonee*, 9 C. L. R., 297.) If such application does not contain a description of the property to be attached, or is otherwise defective, and is not amended *before it is admitted and registered*, a later application for amendment will not save the decreeholder from the bar of limitation under sec. 230. (*Asgar* v. *Troilokya*, I. L. R., 17 Calc., 631, F. B., partially overruling *McGregor* v. *Tarini*, I. L. R., 14 Calc., 124.) An application for a *transfer* of the decree to another Court, though made in the tabular form prescribed by sec. 235, and though a step in aid of execution, cannot be treated as an application for execution within the meaning of sec. 230. (*Nilmony* v. *Biressur*, I. L. R., 16 Calc., 744; *Chundra* v. *Gurroo*, I. L. R., 22 Calc., 375.) If a prior application for execution has been *granted*, and after an application for transfer of the decree to another Court (within the 12 years prescribed by sec. 230), a substantive application for execution is made in the latter Court; this application, if made after the 12 years allowed by sec. 230, will not be saved from the operation of that section by reason of the application for transfer being made within the prescribed period (*Nilmoney* v. *Biressur*, I. L. R., 16 Calc., 744) The last substantive application for execution, though it is a proceeding in furtherance of the application for the transfer of the decree, cannot be treated as a continuation of any application for execution of the decree. (*Ibid.*) An application for process against the person or the property of the debtor, in *addition to* or in *lieu of* processes already obtained, is an independent substantive application to execute the decree, and cannot be treated as a continuation of the previous application. (Compare *McGregor* v. *Tarini*, I. L. R., 14 Calc., 124, and see *Sreenath* v. *Yusoof*, 9 C. L. R., 334; *Damodar* v. *Uttomchand*, I. L. R., 7 Bomb., 214, 217. See p. 880 *supra*.) As to whether the Court has or has not, *after* the date of the decree, made any *order* directing any payment or the delivery of any property to be made at a certain date, see *Balchand* v. *Raghunath*, I. L. R., 4 All., 155; *Jogobundhoo* v. *Hari*, I. L. R., 16 Calc., 16; and cf. *Jhoti* v. *Bhuban*, I. L. R., 11 Calc., 143.

Application to execute decree.

Application to transfer decree.

Revival of application.

Court's order *after* decree.

The 12 years' rule laid down by sec. 230 of the Code does not apply to a decree unless it is a "decree for the payment of money or delivery of other property." A decree for *sale* of hypothecated property passed on a mortgage bond is not such a decree. And it

Sec. 230 does not apply to decree for sale.

Sec. 230, Civ. P. C.

has been held by the Allahabad High Court that sec. 230 applies to what are generally known as "money decrees," and to decrees for the *delivery* of property. (*Ramchurn* v. *Sheobarat*, I. L. R., 16 All., 418.)

Force or fraud.

Where the judgment-debtor has, by *fraud* or *force*, prevented the execution of the decree at some time within twelve years immediately before the date of the application, it is *discretionary* with the Court to *allow* execution after the expiration of the ordinary period of 12 years. (Miscellaneous Appeal No. 89 of 1888, decided by Pigot and Beverley, JJ., on the 19th February 1889.) The word "fraud" in the penultimate (*now* the *last*) paragraph of sec. 230 has been interpreted in a *wider sense* than that in which it is generally used in English law. Chaining the door and refusing to open it when called on to do so by the bailiff and thus preventing the attachment of moveable property, or evading arrest by any contrivance, or raising false objections in bad faith, and dishonestly evading payment of the decree may amount to *fraud* within the meaning of sec. 230. (*Bhagu* v. *Malek*. I. L. R., 9 Bom., 318; *Pattakara* v. *Rangasami*, I. L. R., 6 Mad. 365.) Antecedent fraud which had operated to create a fictitious transfer of some of the judgment-debtor's property, and which prevented the decree-holder from realising the whole amount due to him, is fraud within the meaning of sec. 230. (*Visalatchi* v. *Sivasankara*, I. L. R., 4 Mad., 292.)

Minority or other disability.

As to whether sec. 7 of Act XV of 1877 may extend the period of 12 years prescribed by sec. 230 of the Code of Civil Procedure, see *Moro* v. *Visoji*, I. L. R., 16 Bom., 536; *Lolit* v. *Janoky*, I. L. R., 20 Calc., 714 at p. 716, and page 583 *supra*. Sec. 230 of the Code permits of no extension of the term specified except where execution of the decree is prevented by force or fraud. (See *Nilmony* v. *Biressur*, I. L. R., 16 Calc., 744 at p. 746.)

Repealed provisions of sec. 230.

Under sec. 230 of Act X of 1877 as it stood *before* it was amended by Act XII of 1879, a subsequent application to execute the same decree could not be granted unless the decree-holder satisfied the Court that on the last preceding application *due diligence* had been used to obtain complete satisfaction of the decree. Under the law as it *now* stands, the question whether the decree-holder has acted with sufficient diligence or not does not arise. (See *Ashootosh* v. *Doorga*, I. L. R., 6 Calc., 504.)

Due diligence.

Three years' grace.

The last paragraph of sec. 230 of the Code of 1877 gave three years' grace to holders of decrees which were twelve years or more than twelve years old, on the date on which it was passed *viz.*, the 30th March 1877. (*Damodar* v. *Uttum*, I. L. R., 7 Bomb., 214.) The last paragraph of sec. 23 of the *present* Code, which was passed on the 17th March 1882, gave decree-holders whose decrees were twelve years old on that date a similar grace for three years from that date. But holders of decrees which were twelve years old on the 30th of March 1877 or *at any time before the 30th March* 1880, and which had once enjoyed the benefit of the three years' grace under the Code of 1877, could not claim another three years under the Code of 1882. A decree which has once become dead or unexecutable cannot be revived by a subsequent statute without express words to that effect. (See *Bhawani* v. *Daulat*, I. L. R., 6 All., 388.) A Division Bench of the Madras High Court was of opinion that a decree of 1866, although it had enjoyed the benefit of the three years' grace under the Code of 1877, was protected for another three years by the last paragraph of sec. 230 of Act XIV of 1882.

(*Ganapathi* v. *Balasundra*, I. L. R., 7 Mad., 540. See also *Ramadhar* v. *Ram Dayl*, I. L. R., 8 All., 536).

"Law in force."

But the words "the law in force immediately before the passing of this Code" in the last paragraph of sec. 230 of the Code of 1882 meant the *whole* law on the subject, *viz.*, art. 179 of Act XV of 1877 *as well as* sec. 230 of Act X of 1877, so that, if the decree was barred by the provisions of sec. 230 of Act X of 1877, it could not be executed within the three years allowed by the last paragraph of sec. 230 of Act XIV. (*Goluck* v. *Harpriya*, I. L. R., 12 Calc., 559; *Motichand* v. *Krishnarao*, I. L. R., 11 Bomb., 524; *Kollu* v. *Manjaya*, I. L. R., 9 Mad., 454; *Patumma* v. *Muse*, I. L. R., 11 Mad., 132. *Contra Musharraf* v. *Ghalib*, I. L. R., 6 All., 189, F. B.) The last paragraph of sec. 230 expired on the 17th March 1885, and has been expressly *repealed* by Act VII of 1888, which came into force on the 1st day of July 1888.

Sec. 230 does not affect art. 180.

Sec. 230 of the Code of Civil Procedure, which is expressly referred to in arts. 178 and 179 *only*, does not control the provisions of art. 180; so that a decree of the High Court on its Ordinary Original Civil Side may be executed even after the expiry of the twelve years mentioned in sec. 230. (*Mayabhai* v. *Tribhuvandas*, I. L. R., 6 Bomb., 258; *Ganapathi* v. *Balasundra*, I. L. R., 7 Mad., 540. See notes to art. 180; *Futteh Narain* v. *Chundrabati*, I. L. R., 20 Calc. 551.) It may be observed that Act X of 1877 is a previous, and Act XIV of 1882 a subsequent, *general* Act, while article 180 of Act XV of 1877 applies a *particular* limitation to *certain* decrees and orders. The maxim *Generalia specialibus non derogant* may apply. (See p. 216 *supra*.)

The omission of any reference to sec. 230, Civil Procedure Code, in art. 180, also raises the implication that sec. 230 does not control the provisions of art. 180.

For other notes on sec. 230, see p. 890 *infra*.]

Art. 179.	* 179.—For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, sec. 230.	Three years; or, where a certified copy of the decree or order has been registered, six years.	1 The date of the decree or order, or 2 (where there has been an appeal) the date of the final decree or order of the Appellate Court, or 3 (where there has been a review of judgment) the date of the decision passed on the review, or 4 (where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order, or 5 (where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, sec. 248, or 6 (where the application is to enforce any payment which the decree or order directs to be made at a *certain date*)† such date. *Explanation 1.*—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in

* The period during which the Collector can exercise or perform in respect of the judgment-debor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by secs. 322 to 325 of the Civil Procedure Code shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of sec. 325*a* in respect of any remedy of which the decree-holder has thereby been temporarily deprived. Sec. 325*a*, Civil Procedure Code of 1882.

† The words "certain date" have been substituted for the words "specified date" by Act XII of 1879.

clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.

Explanation II.—"Proper Court" means the Court whose duty it is (whether under section 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order.

[The result of the light thrown upon the effect of the successive Limitation Acts (of 1859 and 1871) by the decisions of the Courts was the enactment of the Act of 1877, art. 179. (Per Pigot, J., in *Ram Saday* v. *Dwarka*, I. L. R., 22 Calc., 644 at p. 646.)

"Application for the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, sec. 230."

Application for execution of decree.

An "application for execution" is a substantive application made according to sec. 235 of the Code, or otherwise, by which proceedings in execution are *commenced*, and not merely an incidental application to carry on proceedings already commenced. (See *Chunder Coomar* v. *Bhogobutty*, I. L. R., 3 Calc., 235; *Panaul Huq* v. *Kishenmunee*, 9 C. L. R., 297; *Chowdhry Paroosh Ram* v. *Kali Puddo*, I. L. R., 17 Calc., 53.) An application (which is, in *form*, an application for *execution*, but) which is *in substance* an application made with the object of *moving* the Court to *proceed* in the matter of a *former* application which had been postponed, suspended or otherwise stayed by reason of some obstacle to the execution, is not (according to the Calcutta, Allahabad, and Bombay High Courts) governed by this article. (*Booboo Pyaroo* v. *Syud*, 23 W. R., 183; *Raghubans* v. *Sheosaran*, I. L. R., 5 All., 243; *Nana Ram* v. *Sita Ram*, I. L. R., 8 All, 545; *Lakhmi* v. *Ball*, I. L. R., 17 All., 425; *Kalyanbhai* v. *Dipchand*, I. L. R., 5 Bomb, 29; *Chandra* v. *Gopee*, I. L. R., 14 Calc., 385 at p. 387; *Chintaman* v. *Balshastri*, I. L. R., 16 Bomb., 294, at p. 301.) Such applications for revival or continuance are governed by art. 178. (See notes to art 178 at p. 880 *supra*.) If, notwithstanding the order which is *alleged* to have been an obstacle to the execution of the decree, the decree-holder *could* have prosecuted his original application to *any extent*, his omission to do so will disentitle him to treat his subsequent application for execution, to *that extent*, as a *continuation* of the original application. If a two-thirds share of the entire property attached by the decree-holder was released by the Court executing the decree, and the decree-holder's regular suit to establish his right to sell that share is dismissed, the decree-holder cannot treat his subsequent application for the sale of the *remaining* one-third share of the property as a continuance of his original application for execution. (*Raghunandun* v. *Bhugoo*, I. L. R., 17 Calc., 268. See also *Sardarni Dya* v. *Kanwar*, Punj. Rec. No. 129 of 1888; Rivaz, 4th ed, p. 259.) Similarly, an order releasing from attachment and sale certain specified properties cannot entitle the decree-holder to treat his subsequent application for the attachment and sale of *other* properties of the judgment-debtor as a *continuance* of the original proceeding. (*Baikanta* v. *Aughore*, I. L. R., 21 Calc., 387.) Again, a subsequent application for an altogether *distinct* process (such as arrest of person, instead of attachment of property, or of attachment of property X, instead of property Y), or for a transfer of the decree to another Court, cannot be a continuance of previous proceedings. (*Krishnaji* v. *Anandra*, I. L. R., 7 Bomb., 293; *Ramsoonder* v. *Gopeeshur*, I. L. R., 3 Calc., 716. See also *Virasami* v. *Athi*, I. L. R., 7 Mad., 595; *Srinath* v. *Yusuf*, 9 C. L. R., 334.) On a principle somewhat similar to that laid down by their Lordships of the Privy Council in the case of *Ranee Surnomoyee* v. *Shoshi Mukhi*, 11 W. R., P. C. 5 (see p. 188 *supra*), it has been held by Mitter and Maclean, JJ., that when the original proceedings in execution resulted in a sale of the judgment-debtor's property, but that sale being set aside the decree-holder was directed to refund the sale proceeds, a subsequent application to execute the decree may be treated as an application to continue the original proceed-

Application for revival, or continuance of previous application.

Application to have (abortive) process repeated.

ings. (*Issuru* v. *Abdool*, I. L. R., 4 Calc., 415.) The subsequent application in that case was virtually one to have that *part* of the execution process *repeated* which had proved *abortive* owing to some irregularity or otherwise, and was therefore an application in continuance and revival of the old proceedings. (See *Krishnaji* v. *Anandrav*, I. L. R., 7 Bomb., 293 at p. 296.) In execution of a decree for possession under a mortgage, the decree-holder was obstructed by another mortgagee of the same judgment-debtor. On an application for removal of the obstruction, the Court held that the decree-holder was not entitled to possession until the lien of the mortgagee in possession was redeemed. More than three years after this order, the *judgment-debtor* redeemed the lien of the mortgagee in possession. The decree-holder then applied for possession in execution of his decree, and it was held that his application *could not* be treated as a *revival* of his original application; for he *could have* himself redeemed the other mortgage, and *applied* for possession within the time allowed by art. 179. As to what is or is not a *fresh* application, *see* notes to art. 178 at pp. 880-1 *supra*. According to the Madras High Court, *all* applications for *execution*, even if made after the removal of *intermediate obstacles*, are governed by art. 179, and not by art. 178. (*Narayana* v. *Pappi*, I. L. R., 10 Mad., 22.)

What is *not* a revival or continuance of prior application.

An application to *enforce an agreement* (sanctioned by the Court) by which execution is deferred, but is liable to be again proceeded with, if the judgment-debtor makes default in paying certain instalments, is not an "application for the execution of a decree," though such application seeks, as a *result*, the execution of the original decree. (*Sham* v. *Piari*, I. L. R., 5 All., 596.) An application to enforce an order (of payment by the debtor's tenant) passed by the Court *subsequently* to the decree, not being *strictly* an application for fresh execution of the *decree*, is not governed by art. 179. (*Radhakishore* v. *Aftab*, I. L. R., 7 Calc., 61.) But where the decree-holder, instead of asking the Court to enforce an agreement sanctioned by the Court after the decree, applies to execute the original *decree*, his application *is* governed by this art. (*Hurronath* v. *Chunilal*, I. L. R., 4 Calc., 877.) An application by the judgment-debtor asking the Court to ascertain how much the judgment-creditor has been overpaid, is *not* an application for the *execution* of a decree. (*Muthora* v. *Mohunt*, 22 W. R., 211. *See* notes to art. 178, p. 879 *supra*.)

Enforcing what is *not* a *decree*.

An application for refund of the excess amount is governed by art. 178, and the right to apply accrues when the amount is ascertained. (*Mula Raj* v. *Debi Dihal*, I. L. R., 7 All., 371.) See p. 879 *supra*.

Refund.

But an application by a party entitled to a benefit by way of *restitution* under a *decree* of the Appellate Court (*see* sec. 583, Civil Procedure Code) *is* an application to execute the appellate decree. An application for refund of money, paid by a pre-emptor under the decree of the *first* Court, in consequence of such decree being *modified* by the Appellate Court, should be treated as an application for execution. (*Nandram* v. *Sitaram*, I. L. R., 8 All., 545.)

Restitution.

Where in a suit for possession and mesne profits, the Court *reserves* the enquiry as to the *amount* of mesne profits under sec. 212 of the Code, the decree for possession is only a *partial* or *preliminary* decree in the suit. In such a case there is to be a further enquiry after the decree, and a *further* decree in respect of mesne profits. There can be no application for *execution* of the decree for mesne profits until the amount due is ascertained. (*Dildar* v. *Mujudunnissa*, I. L. R., 4 Calc., 629; *Baroda* v. *Ferguson*, 11 C. L. R., 17; *Puran*

Mesne profits.

Interlocutory decree.

Chand v. *Ray Radha*, I. L. R., 19 Calc, 132, F. B.) If one of the judgment-debtors dies after the interlocutory decree which declared his liability to mesne profits in *general* terms, his heirs or other representatives should be made parties to the proceeding in which the *amount* of mesne profits is ascertained, and an *operative* money decree determining the extent and quality of his liability is passed by the Court. Such heirs or representatives will not be liable if they have not been made parties to such operative decree. (*Radha Prasad* v. *Lal Saheb*, I. L. R., 13 All., 53 P. C.) It is only under secs. 211 and 212 of the Code that the Court is at liberty to *determine* the *extent of the rights* of litigants in proceedings taken *after* decree—and these sections relate to the *amount of mesne profits*. If the decree leaves *other* matters unascertained, it should be treated as a declaratory decree, and so far as it is *declaratory*, it cannot be executed. (*Ram* v. *Chooaram*, 4 C. L. R., 97.) As to other cases of *preliminary* or *interlocutory* decrees, see p. 878 *supra*. As to preliminary decrees,

Decree *nisi* in mortgage suit.

or decrees *nisi*, for redemption, foreclosure, or sale, see p. 852 *supra*. According to the Allahabad and Madras High Courts, an application for the execution of such decrees, before an order absolute is made, is governed by art. 179, but according to the Calcutta High Court an application for an order absolute may be made at *any time*. (See *Oudh Behari* v. *Nageshar*, I. L. R., 13 All. 278; *Elayadath* v. *Krishna*, I. L. R., 13 Mad., 267; *Poreshnath* v. *Ramjadu*, I. L. R., 16 Calc., 246; *Ajudhea* v. *Baldeo*, I. L. R., 21 Calc., 818).

Decree, not final.

In a suit praying for specific performance of a contract, or for damages in the alternative, a decree for specific performance is not in the fullest sense a *final* decree, but one in a suit which is still *pending* (*Peari Sundari* v. *Hari*, I. L. R., 15 Calc., 211 at p. 214.)

Summary decisions.

A *summary* decision or order of a *Civil Court*, as well as a decree or order made in a *regular* suit falls within this article. If art. 179 were inapplicable to a decision *other* than a decree or order passed in a regular suit or an appeal, art. 178 would have applied. And if art. 178 be applicable, applications to execute such a decision must be made within three years of the accrual of the right to apply. Under sec. 22, Act XIV of 1859, and art. 166, Act IX of 1871, one year only was allowed for the execution of *summary* decisions, such as those under sec. 53 of the old Registration Act, XX of 1866. (*Mina* v. *Juggut*, I. L. R., 10 Calc., 196, P. C.) See p. 881 *supra*.

Art. 180.

Art. 180 applies to decrees of the High Courts of Calcutta, Madras, and Bombay in the exercise of their *ordinary original civil* jurisdiction, and to orders of Her Majesty in Council. An order for costs passed by the High Court in its Appellate Side, on the rejection of a petition for leave to appeal to Her Majesty in Council, is governed by art. 179. (See *Hurro* v. *Bhupendro*, I. L. R., 6 Calc., 201.)

Sec. 230 of the Code.

Under the law in force prior to the passing of Act X of 1877, no period was prescribed beyond which execution of decrees should not be allowed, provided they were kept alive in due manner; but in 1877, sec. 230 of Act X of that year enacted that there should be an end to all execution proceedings on the completion of 12 years from the date of the decree, except in certain specified cases. But sec. 230 does not apply, *simply* because the decree is more than 12 years old. It is only when a *previous application* for execution has been *made* under the section *itself* and *granted* by the Courts that its provisions come into play. (*Anajji* v. *Bamji*, I. L. R., 10 Bomb., 348.) See p. 882 *supra*.

In *Chowdhry Parooshram* v. *Kali Puddo*, I. L. R., 17 Calc., 53, where, in execution of a decree of 1857, certain property had been attached in 1860 (*before* the enactment of sec. 230 of the Code) and where such property continued to be under the management of a Receiver, it was held that such decree of 1857 could be executed even after 30 years. Execution proceedings are deemed to continue so long as the appointment of the Receiver continues, although the execution case was struck off the file. (*Radha* v. *Aftab*, I. L. R., 7 Calc., 61.) Where no previous application has been made and granted (under sec. 230 of the Code), the decree may be executed if it is not barred by the provisions of art. 179. (*Ibid*) If the question of an *absolute* bar under sec. 230 does *not* arise, the provisions of art. 179 shall apply to all decrees of the Mofussil Civil Courts. (Branson's Digest of unreported Bombay judgments, 214.) An application made even under sec 230 of the Procedure Code of 1877, and granted by the Court, fulfils the condition mentioned above. (*Patunnissa* v. *Muse*, I. L. R., 11 Mad., 132; *Goluck* v. *Harapria*, I L. R., 12 Calc., 559. But cf. *Lokhu* v. *Ramdin*, I. L R., 8 All., 419.) As to the provisions of sec. 230 of the Code, *see* notes to art. 178, pp 882-5 *supra*. It may be observed that the words "the Code of Civil Procedure, sec. 230" in arts. 178 and 179 originally meant sec. 230 of Act X of 1877; but now they mean sec. 230 of Act XIV of 1882. (See sec. 3, Act XIV of 1882.)

Application under Code of 1877.

So long as Act IX of 1871 was in force, Act XIV of 1859 governed all applications for the execution of a decree passed in any suit instituted before the 1st April 1873. Act IX of 1871 was wholly repealed by Act XV of 1877. This latter Act contains *no saving clause* similar to that in sec. 1 of Act IX of 1871, which made the Act of 1871 inapplicable to any suit, or to *any application in any* suit instituted before the 1st April 1873. (See *Mungal Pershad Dichit* v. *Grija Kant*, I. L. R., 8 Calc., 51 P. C.) Arts. 179 and 180 of Act XV of 1877, therefore, operate from the date on which they came into force as regards all *new* applications for execution made on or after the 1st October 1877. (See *Becharam* v. *Abdul*, I. L. R., 11 Calc., 55; *Juggomohun* v. *Luchmessur*, I. L. R., 10 Calc., 748.) By reason of the provisions of sec. 6, Act I of 1868, *applications* for execution made before the 1st October 1877, and *pending* on that date, were governed by Act IX of 1871 or Act XIV of 1859, according as the suit in which the decree was passed, was instituted after or before the 1st April 1873. (See *Juggomohun* v. *Luchmessur*, I. L. R., 10 Calc., 748, and p. 560 *supra*.) In the absence of a *legislative* provision such as that contained in sec. 1 of Act IX of 1871, the law of limitation applicable to proceedings in *execution* is not the law under which the *suit* was instituted, but the law in force at the date of the *application* for execution. (*Gurupada-pa* v. *Virbhadrapa*, I. L. R., 7 Bomb., 451.) After some conflict of opinion, it has been held by a Full Bench of the Calcutta High Court that the term "proceedings" in sec. 6, Act I of 1868, does *not* embrace the whole suit, so as to include proceedings in *execution* after the suit is decreed. (*Debnarain* v. *Narendra Kishna*, I. L. R., 16 Calc., 267, F. B.) *See* pp. 205, 213, and 560 *supra*. It may be mentioned here that sec. 6 of the General Clauses Act does not apply where the change in the law is brought about, not by the *repeal* of the old Act, but by the *addition* to it of a new provision. (*Jagodanund* v. *Amrita*, I. L. R., 22 Calc., 767, at p. 781 F. B.) The object of sec. 6 is probably to leave proceedings commenced under the old Act unaffected by the repealing Act, only so far as they have proceeded, leaving their further

What law applicable to applications made after the 1st Oct. 1877.

Pending applications.

Sec. 6, General Clauses Act.

progress to be regulated by the procedure in force after the repeal. *(Ibid).*

Lex fori. As to conflict of laws, and the *lex fori*, see p. 597 *supra*, and *Tincowrie* v. *Debendro*, I. L. R., 17 Calc., 491.

Rulings under Act XIV. For the provisions of secs. 20 and 21, Act XIV of 1859, on the subject of execution and the interpretation put upon them, *see Ram Saha* v. *Degun*, 6 W R, Misc, 98, F. B.; *Kangaleechurn* v. *Bonomalee*, 7 W. R., 515, F B.; *Maharajah of Burdwan* v. *Balram Sing*, 14 W. R., P. C., 21; *Kristo Kinker* v. *Burrodakant*, 17 W. R., 292, P. C.; *Roy Dhunpat Sing* v *Mudhomotee*, 11 B. L. R., 23, P. C.; *Benoderam* v. *Brojendra*, 21 W. R., 97, P. C.; *Heralal* v. *Badredas*, I. L. R., 2 All, 792, P C.; *Delhi and London Bank* v *Orchard*, I. L R., 3 Calc., 47, P. C.; and *Mina Konwari* v. *Juggat*, I. L. R., 10 Calc., 196, P. C.

Rulings under Act IX. For the provisions of arts. 167 and 168, Act IX of 1871, on this subject and the interpretation put upon them, *see Procash Chunder* v. *Poornochunder*, 21 W. R., 410; *Eshan Chunder* v. *Prannath*, 22 W. R., 512, F. B.; *Faez Buksh* v. *Sadut Ali*, 23 W. R., 282; *Ram Autar* v. *Ajudhia*, I. L. R., 1 All., 231; *Dhonessur* v. *Roy Gooder*, I. L. R., 2 Calc, 336, F. B.; *Chunder Coomar* v. *Bhogobutty*, I L R., 3 Calc., 235, F. B.: *Jamnadas* v. *Lalitram*, I. L. R., 2 Bomb., 294; *Ambica Pershad* v. *Surdhari*, I. L. R., 10 Calc., 581, F. B.

Date of application. Where an *informal* application for execution presented *within* the prescribed period is not dismissed, but allowed to be amended *after* the expiry of the period, the date of the amendment is *not* the date of the application. The original date on which the application was first made is the date of the application. (*Fuzloor* v. *Altaf*, I. L R., 10 Calc., 541) *See* also *MacGregor* v. *Tarini*, I. L. R., 14 Calc., 124, and notes to sec. 4, p. 570 *supra*.

Amendment, when allowable. An application for execution, it has been held, cannot be amended after it has been admitted, and an order for execution made under sec. 245 of the Code. (*Asgar* v. *Troylokya*, I. L. R., 17 Calc., 631, F. B) It has been held in Madras that it is only under *special* circumstances that an application for execution may be allowed to be amended, although at the time of amendment execution in respect of a part was *barred* by limitation. (*Sattapa* v. *Jogi*, I. L. R., 17 Mad., 67.)

Adjudication of question of limitation. On the presentation of the last of a series of applications made for the execution of a decree, the Court may, and should, consider the question whether, on the date of making a prior application, the decree sought to be enforced was barred by limitation. The fact that the judgment-debtor, though served with a notice under sec. 248 of the Code, did not, on that occasion, appear, or urge the plea of limitation, will not affect the question. (*See Bisseshur* v. *Maharajah of Burdwan*, 10 W. R., F. B., 8; *Unnoda* v. *Sheikh Koorpan*, I. L. R., 3 Calc., 518; and *Ramu* v. *Doyal*, I. L. R, 16 All., 390 at p. 393.) If the Court did not then (for alleged want of authority or otherwise) *adjudicate* upon the question of limitation, it will not be debarred from trying the question now. (*Delhi and London Bank* v. *Orchard*, I. L. R., 3 Calc., 47 P. C.) Where the right to execution is barred by limitation, a *subsequent acknowledgment* by the *judgment-debtor* of his liability under the decree cannot revive it. (*Jhoti* v. *Bhubun*, I. L. R., 11 Calc., 143.) But if the *Court*, on such prior application, had ordered execution to issue, or had otherwise *adjudicated* upon the question of limitation, it would be now precluded from trying the question again, although the debtor had

not then appeared to oppose the execution. The general *principle* (*interest republicæ ut sit finis litium*) on which the doctrine of *res-judicata* as to *suits* is based, applies to *execution* cases. If such orders in execution proceedings were not binding on the parties, there would be no end to litigation. (See *Mungal Persad* v. *Grijakant*, I. L. R., 8 Calc., 51, P. C.; *Buniram* v. *Nanku Mal*, L. R., 8 Ind. App., 123, P. C.; *Ramkirpal* v. *Rupkuari*, I. L. R., 6 All., 269, P. C; *Sarju* v. *Sitaram*, I. L. R, 10 All., 71, 79; and *Bandey* v. *Romesh*, I. L. R., 9 Calc., 65. *See* also *Ramu Rai* v. *Doyal*, I. L. R., 16 All., 390, and p 82 *supra*.) An order issuing execution, though made out of time, precludes the *debtor* from questioning its propriety after it has become final. But *third* parties are not so precluded. (*Tincowrie* v. *Debendro*, I. L. R., 17 Calc, 491.) It may be observed that, if the Court allows execution by issuing a writ of attachment, and the debtor does not forthwith plead limitation in the course of the same proceeding, or if the order allowing execution has become final in a previous proceeding initiated by a previous application for execution, Mungal Pershad Dichit's case will apply. (*Srihary* v. *Murari*, I. L. R., 13 Calc., 257, 261.) If the order allowing execution has not become final, the judgment-debtor may appeal against the order or apply for a review of judgment. (*Ramu Rai* v. *Doyal*, I. L. R., 16 All., 390.)

Adjudication (direct or indirect) is a bar on *general* principles.

Third parties not precluded by adjudication.

Mungal Pershad's case, when applicable.

A Court having jurisdiction decided in the course of execution proceedings (in an order which was not appealed) that the decree to be executed awarded mesne profits according to its true construction; and it was held by their Lordships of the Privy Council that this decision had become final between the parties, not under sec. 13 of the Code of Civil Procedure, but upon general principles of law. It was as binding between the parties as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit. If it were not binding, there would be no end to litigation. The order construing the decree having been made *in the same suit* in which the application was made, the question whether the law of *res-judicata* applied was not relevant, if the term was understood as referring to a matter decided in *another suit*. (*Ram Kirpal* v. *Rupkuari*, I. L. R., 6 All., 269 P. C) But the rule laid down in sections 103 and 373 of the Code of Civil Procedure, precluding a plaintiff from bringing a fresh suit on the same cause of action if his first suit is dismissed for his neglecting to prosecute it (by not appearing on the day of hearing or withdrawing from the suit without obtaining the permission of the Court to institute another suit) is a rule applicable to *suits* before decree, and not to execution proceedings. (See Act VI of 1892, and *Bunko Behary* v. *Nil Madhab*, I. L. R., 18 Calc., 635 at p. 639.) Nothing in Chapter VII (*e.g.* secs. 99, 103, 108), Chapter XIII (such as sec. 158) or Chapter XXII (*e.g.*, sec. 173) of the Code of Civil Procedure can apply to proceedings in execution of decrees. (See *Ramu* v. *Doyal*, I. L. R., 16 All., 390, 394.) Even before the passing of Act VI of 1892, sec. 647 of the Code did not and could not extend the provisions of the Code relating to *suits* to execution proceedings which were and are governed by Chapter XIX (secs. 223-343) of the Code. (*Thakur Prosad* v. *Fakirullah*, I. L. R., 17 All., 106 at pp. 111, 112 P. C) It has also been held that sec. 43 of the Code does not apply to proceedings in execution of a decree. (*Radha Kishen* v. *Radha Pershad*, I. L. R., 18 Calc., 518.) Though the chapters and sections of the Code relating to *suits* do not apply to proceedings in execution of decrees, the Court has *inherent power* to dismiss an application for execution when the

Other questions.

Res judicata and *general* principles.

Sections of the Code relating to *suits* do not apply to execution proceedings—*e.g.*, secs. 43, 99, 103, 108, 158, 373 and 374.

Act VI of 1892.

Court has inherent power to dismiss application.

applicant fails through his own laches to put the Court in a position to proceed with his application, as for instance, by failing to pay the Court fees for service of a notice under sec. 248 on the judgment-debtor. Similarly, the Court has inherent power to proceed forthwith to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application, and that act has not been done. Such inherent power must exist in the Courts, for otherwise the work of Courts could not be disposed of, and the Courts would have no power to bring litigation in such cases to a close. (*Dhonkal* v. *Phakkar* I. L. R., 15 All, 84 at p. 95.)

Not to *restore*.

But the Court has *no* inherent power (apart from provisions similar to those of sec. 103) to *restore* to the file an application for execution dismissed in the absence of the applicant. (*Hajrat* v. *Valiulnissa*, I. L. R., 18 Bomb., 429) In so far as such order of dismissal may be accompanied by any order as to costs, or otherwise places one party in a position of advantage over the other, it is an order in a suit which cannot be altered by the Court which made it, excepting possibly on review. But though there is no statutory authority (like sec. 103 of the Code) or inherent power in the Courts to *restore* to the file an application for execution which has once been dismissed for default, such dismissal is ineffectual to bar a subsequent application for execution. (*Ibid*, see also *Tirthasami* v. *Annappayya*, I. L. R., 18 Mad, 131 at p. 133.)

But dismissal of prior application for default not necessarily a bar to subsequent application.

It is clear both from the Code itself, and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a *succession* of applications for execution. The High Court of Allahabad impugned the propriety of the practice which allows successive applications for execution. But the High Court of Bombay, after one contrary decision, and the High Courts of Calcutta and Madras and their lordships of the Privy Council have affirmed the legality of the practice which has grown up all over India under the enactments mentioned above. (See *Thakur Prasad* v. *Fakirullah*, I. L. R., 17 All., 106 at p. 112 P. C.; see also p. 882 *supra*.) It has now been held by a Full Bench of the Allahabad Court itself that the striking off of an application for execution or the dismissal of such an application in *default* is no bar to the presentation and prosecution of a *fresh* application for execution. (*Dhonkal* v. *Phakkar*, I. L. R., 15 All., 84 at p. 101.) This case has been approved of in Bombay and Madras. (See I. L. R., 18 Bomb., 429 at p. 431, and I. L. R., 18 Mad., 131 at p. 133.)

Dismissal on the merits.

But where there has been an adjudication of the case on the *merits*, and such adjudication has not been set aside on appeal or otherwise, that will on general principles be a bar to any subsequent application for the same purpose. (I. L. R., 15 All., 84 at p. 100.) When an execution case is struck off the file or dismissed upon a ground *other* than a distinct finding, that the decree is incapable of execution, or that the decree-holder's right is barred by limitation, or by any other law or on some ground touching the merits, such striking off or dismissal does not operate to bar a fresh application for execution. (*Ibid*, p. 101; I. L. R., 18 Mad., 131 at p. 133.)

When *not* on the *merits*.

The striking off of an application or the dismissal of it, if such application is not made in compliance with sec. 235, 236 or 237 of the Code, is no bar to the presentation of a fresh application for execution. The order is based on a ground which does not go to the *merits*, and to the decree-holder's *right* to execute his decree. (See I. L. R., 15 All, at p. 100.) An order that an application for execution "be sent to the record room" on the ground that the Deputy Commissioner who passed the order could not execute the decree without the Commissioner's sanction is *not* an adjudication

on the merits, and does not bar a subsequent application for execution. (*Delhi and London Bank* v. *Orchard*, I. L. R., 3 Calc., 47 P. C., as explained in *Manjunath* v. *Venkatesh*, I. L. R., 6 Bomb., 54; and *Dhonkal* v. *Phakkar*, I. L. R., 15 All., 84 at pp. 98 and 99.) An order striking off or dismissing an application for execution on the ground that the decreeholder failed to procure the attendance of his witnesses or to perform any other act necessary to the further progress of the application, *might possibly* be an adjudication on the *merits* on the materials before the Court which *might* finally decide the *rights* of the parties so far as any question relating to the execution of the decree was concerned. (I. L. R., 15 All., at p. 100.) But sec. 158 of the Civil Procedure Code being inapplicable to execution proceedings, the dismissal of an application for execution for any *default* of the decree-holder would (at least, in the generality of cases) be no bar to a fresh application for execution. (See *Tirthasami* v. *Annappayya*, I. L. R., 18 Mad., 131 at p. 133.) The expression "striking off" a case or an application is not to be found in the Code of Civil Procedure. "Striking off" is not in accordance with any provisions of the Code. (*Baroda* v. *Fergusson*, 11 C. L. R., 17; *Biswa* v. *Binanda*, I. L. R., 10 Calc., 416.) A case struck off the file of the business pending in the Court is not necessarily dismissed or finally disposed of. (See *Ram Kirpal* v. *Rupkuari*, I. L. R., 6 All., 269 P. C.) The striking off an execution case in accordance with a petition presented to the Court, the attachment being maintained, cannot possibly affect the proceedings between the parties relating to the continuance of the attachment, and it can at most be regarded as an order passed for the purposes of *administrative* business. (*Syam Singh* v. *Baidyanath*, I. L. R., 13 Calc., 176.) It would be clearly wrong to hold that, when for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. (*Rajah Mohesh* v. *Kishanund*, 9 Moo. I. A., 328.) In considering the effect of an order passed by a Court in a proceeding for the execution of a decree, the Judge must be guided by the *reason* stated for making the order, and not by the mere *phraseology* employed in the formal direction, which concludes the order. It does not matter whether the Court uses the phrase "the case be dismissed," "be struck off," "be shelved," or "be sent to the record room." If the order is not based on a *judicial adjudication* on the *merits* of the case, it is no bar to a fresh application for execution, whether the word "dismissed" or the words "struck off the file," or any other similar words have been used in the order. (*Dhonkal* v. *Phakkar*, I. L. R., 15 All., 84 at pp. 100, 101.) The "striking off" or "shelving" of an execution application is an order which may admit of *different* interpretations according to the circumstances under which it has been passed. (*Hurronath* v. *Chunilal*, I. L. R., 4 Calc., 877; *Dhonkal* v. *Phakkar*, I. L. R., 15 All, 84 at p. 102. See also *Venkatrav* v. *Bijesing*, I L. R., 10 Bomb., 108; *Chintamun* v. *Belshastri*, I L. R., 16 Bomb., 294 at p. 302.)

Dismissal for default *may* in *some* cases be a bar.

But sec. 158 does not apply.

Striking off an application, and its effect.

The reason (not the language) of the order to be considered.

The dismissal of an application for the execution of a decree for redemption does not bar a fresh application for the execution of the same decree after it has been confirmed on appeal. The decree of the Appellate Court may be executed even though the first Court's decree cannot be so executed. (*Nanchand* v. *Vithu*, I. L. R., 19 Bomb., 258.)

Dismissal of application to execute first Court's decree, no bar.

Striking off petition of *objections*.

The principle of the Full Bench ruling in *Dhonkal* v. *Phakkar*, I. L. R., 15 All., 84, has been applied to a judgment-debtor's petition of *objections to execution*, when such petition has been struck off, shelved or dismissed for his own *default*. (See *Tileshar* v. *Parbati*, I. L. R., 15 All., 198 at p. 205; *Ramu Rai* v. *Doyal*, I. L. R., 16 All, 390 at p 395) If the judgment-debtor's objections have been adjudicated upon on the *merits* and such adjudication has become final, he cannot urge the same objections in any subsequent proceeding for execution.

Indirect adjudication.

An order for execution (by the issue of a writ of attachment or otherwise) made after notice and in the absence of the judgment-debtor, or without notice to him, amounts to an adjudication on the merits on the question as to whether the execution of the decree is barred by limitation or not. (See *Mungal Pershad Dichit* v. *Grijakant*, I. L. R, 8 Cal., 51 P. C., and *Ramu Rai* v. *Doyal*, I. L. R., 16 All., 390 at p. 395.)

Jurisdiction to try question of limitation in case of *transferred* decrees.

A Court to which a decree has been *transferred* for execution has jurisdiction to determine whether or no such decree is barred by limitation. (*Nursing* v. *Hurryhur*, I. L R., 5 Calc., 897; and *Leake* v. *Daniel*, 10 W. R., F. B, 10.) The *original* Court *also* has jurisdiction to determine the question of limitation. (*Srihary* v. *Murari*, I. L. R., 13 Calc., 257.) But where a Court makes an *order for execution*, and then transmits the decree for execution to another Court, the latter Court has *no power* to determine whether execution is barred by limitation. The order for execution is binding on the parties until reversed on appeal. It is *otherwise*, where the transmissing Court has made *no* order for execution, but has merely transmitted the decree and the certificate of non-satisfaction.

Law applicable.

(*Hussein Ahmad* v. *Saju Mahamad*, I. L. R., 15 Bom., 28.) If there are different laws of limitation in the two Courts, the laws of the Court to which the decree has been transmitted shall be applicable. (*Leake* v. *Daniel*, 10 W. R., F. B., 10; *Hukam Chand* v. *Gyanendra*, I L R., 14 Calc., 570.) This ruling applies to decrees transmitted for execution under sec. 287 of the Procedure Code of 1859, which said that the copy of the decree transmitted should have the *effect* of a decree of the Court to which it was transmitted for execution. Under the later Codes of 1877 and 1882, a decree transmitted to the High Court, by the Court which passed the decree, (*e.g.*, by the Presidency Small Cause Court) has *not* the same effect as a decree of the High Court, and must therefore be executed within 3 years under article 179. (*Tincowry* v. *Debendro*, I. L. R., 17 Calc., 491.)

Barred decree not invalid.

For purposes unconnected with *execution*, the *validity* of a decree is not affected by an application for its execution being barred by limitation. Such a decree, even if *ex parte*, would still be conclusive *evidence* of matters decided by it. (*Birchunder* v. *Hurrish Chunder*, I. L. R., 3 Calc., 383)

Exparté or consent decrees.

A judgment by consent or default is also as effective as an estoppel between the parties, as a judgment whereby the Court exercises its mind on a contested case. *Per Vaughan Williams*, J. (*In re* South American and Mexican Company, 1895, 1 Ch., 37 at p. 45.) As to what matters are necessarily decided by an *ex parte* decree and what are not, *see Modhusudun* v. *Brae*, I. L. R., 16 Calc., 300 F. B. A sale in execution of a barred decree remains in force until it is set aside. (*Mahomed* v. *Purundur*, I. L. R., 11 Calc., 287.)

No *suit* on a decree.

It has been held that in British India a *suit* does not lie on a decree, whether its execution is barred by limitation or not. (See *Merwanji* v. *Ashabai*, I. L. R., 8 Bomb., 1.) A money decree must be enforced by *execution* and attachment, and not by a separate *action* against parties in possession of the judgment-debtor's property. (*Hirza Mahomed* v. *Widow of Balmukund*, 26 W.

R., P. C., 82.) The doctrine of *res-judicata* will prevent the institution of a second suit on the same cause of action. (*Gopi* v. *Tincowri*, 1 C. L. R., 254.) It *may* be *otherwise* where a decree for *redemption* is not executed within the time allowed by the law of limitation. A second suit for redemption on the ground that the mortgage debt has now been paid off will lie in certain cases. (*Roy Dinkar* v. *Sheo Golam*, 22 W. R., 172; *Sami Achari* v. *Somasundarun*, I. L. R., 6 Mad, 119; *Muhammad* v. *Mannulal*, I. L. R., 11 All, 386.) Cf. *Maloji* v. *Sugaji*, I. L. R., 13 Bomb., 567; and see p. 852 *supra*. Second suit for redemption.

Article 179 provides several points of time from which the period of three years, or six years, as the case may be, shall begin to run, and for the purposes of the Limitation Act, the period which begins from each point is a *separate* period, and if the person entitled is under a disability at the time when any one of such period commences, the operation of the Act is suspended during the continuance of the disability by the operation of sec. 7. (*Lolit Mohun* v. *Janoky*, I. L. R., 20 Calc., 714.) Time may commence to run from the date of the decree if there is nothing to prevent it at such date. But the rule in sec. 9, that when time *once* commences to run it does not cease to run, does not apply to the *separate* periods which commence to run from the date of the appellate decree or of an application to execute the decree or to take some step in aid of execution or from the other four points of time. (*Ibid.* See p. 583 *supra*.) Six clauses of art. 179. Six *separate* periods from six separate points. Sec. 9

The several points of time referred to above are—1, the date of the original decree or order; 2, the date of the appellate decree or order; 3, the date of the decision on review; 4, the date of applying (*a*) for execution, or (*b*) to take some step in aid of execution; 5, the date of issuing a notice under sec. 248; 6, the date at which the decree or order directs a payment to be made. Period of 3 years computed from what dates. Clauses 1 to 6.

Where a *certified copy* of the decree or order has been *registered*, the decree-holder gets six years instead of three years to execute his decree. Where a *memorandum* only of the decree was sent for registration under Act XX of 1886, the decree-holder was *not* entitled to a period of six years. (See Branson's Digest of printed judgments of the Bombay High Court.) Six years, when allowed.

The decree in a suit which must be executed is the decree as passed or as *altered* by a *proper* order for that purpose, as, for example, by an order under sec. 210 of the Code. (*Gandharop* v. *Shiodarshan*, I. L. R., 12 All., 571.) But the amendment of a decree under sec. 206 of the Code does not give the decree-holder a fresh starting point if the decree, as originally passed, was *capable* of execution. (*Tarsi Ram* v. *Man Singh*, I. L. R., 8 All., 492; *Muhammad* v. *Muhammad*, I. L. R., 17 All., 39.) Period not computed from date of amendment of decree.

The period of limitation in the case of an *ordinary* decree is to be computed from the date of the decree or order, *if* there has been (*a*) *no appeal*, (*b*) *no review* of judgment, (*c*) *no previous application* for execution or to take some step in aid of execution, and (*d*) *no notice* issued under sec. 248 of the Code. But where the decree or order directs a *payment* to be made at a *certain future date*, the period of limitation for an application to enforce such payment is to be computed from such date, and *not* from the date of the decree or order. This is provided for by cl. 6 of art. 179. But a decree which requires *something* to be *done* (not *money* to be *paid*) at some *future* date, none of the clauses of art. 179 would seem to be applicable. The editor of the Madras Law Journal suggests that the Ordinary decree. Decree requiring something to be *done* in *future*.

law should be amended in this respect. But so long as the amendment is not made, art. 178 will be applied to applications for the execution of such decrees. (See notes to cl. 6, *infra*.)

Decree incapable of execution.

If again the decree as drawn up is absolutely incapable of execution, no application to execute it can be made until the decree is amended so as to be capable of execution. It has therefore been held that art. 178 applies to applications for execution of decrees so amended, and that the three years run from the date of the amendment of such decree. The first paragraph of art. 179 evidently contemplates the existence of a decree *capable* of being executed at the date of the decree. (*Muhammad* v. *Muhammad*, I. L. R., 17 All., 39.) This rule does not apply to decrees which, though defective, are not absolutely incapable of execution. In the case of such decrees, amendment under sec. 206 does not entitle the decree-holder to avail himself of the provisions of art. 178. Applications for execution of such decrees (even after amendment) are governed by the ordinary rule laid down by art. 179. (See *Kallu Rai* v. *Fahiman*, I. L. R., 13 All, 125.) Amendment of a decree under sec. 206 of the Code is not a step in aid of execution, and does not give the decree-holder a fresh starting point. (*Ibid.*)

(Amendment of decree under sec. 206.)

Incomplete decrees for mesne profits or value of improvements.

A decree for possession and for mesne profits to be ascertained in execution is, so far as the decree for mesne profits is concerned, only an interlocutory order which does not become a final and *complete* decree until the *amount* of mesne profits payable by the judgment-debtor *is ascertained* and directed to be paid. (*Baroda* v. *Fergusson*, 11 C. L. R, 17. *See* also *Dildar* v. *Mujeedunnissa*, I. L. R., 4 Calc., 629; *Krishnan* v *Nilkandan*, I. L. R., 8 Mad, 137.) This last case related to the payment by the plaintiff of the value of improvements to be determined in execution of a decree for redemption. The value was ascertained within three years of the date of the decree, and it was held that the decree was incapable of execution before the value was ascertained. It may be observed that secs. 211 and 212 of the Code have no application to the determination of the value of improvements made by the mortgagee, and that there is no other section of the Code which expressly authorizes the Court to leave any matter in dispute undetermined by the decree. (See *Ram* v. *Chooaram*, 4 C. L. R, 97) In the case of *Baroda* v. *Fergusson*,

Application for *completing* decrees, when to be made.

the provisions of art 178 were *not* considered, and the learned Judges were of opinion that the decree-holder was not bound to apply to the Court to make the decree *complete* within three years. In *Anando* v *Anando*, I. L. R, 14 Calc., 50, it was held that such an application was governed by art. 178. In this case the application for ascertainment of mesne profits was not made even within three years of the date of the delivery of possession in execution, and the application was therefore held to be barred. Most of these cases have been reviewed by a Full Bench of the Calcutta High Court, and it has been held that a decree for possession of lands, with a direction that the amount of mesne profits should be ascertained in execution of the decree, is, so far as the mesne profits are concerned, an *interlocutory* order, and that no execution in respect of such mesne profits can issue until the actual amount of the mesne profits has been found and determined. It has also been held by the Full Bench that neither art. 178 nor art 179 applies to an application to ascertain the amount of

Arts. 178 and 179 do not apply.

mesne profits awarded by a decree in accordance with the provisions of sec 211 or 212 of the Code of Civil Procedure. (*Puran Chand* v *Roy Radha*, I. L. R., 19 Calc., 132, F. B.) See notes to art. 178 at p. 877, *supra*, The prior decree which merely declares in *general*

terms the defendants' liability for mesne profits is no doubt binding on the defendants, in so far as it finds that the defendants are accountable for mesne profits, but their property cannot be attached by virtue of such a decree. The decree, so far as it relates to mesne profits, does not become *operative* or capable of being put into execution against any of the defendants until the *extent* and *quality* of his liability is determined or ascertained. (*Radha Prasad* v. *Lal Sahab*, I. L. R., 13 All., 53 at p. 65 P. C; and *Puran Chand* v. *Roy Radha*, I. L. R. 19 Calc., 132 at p 137 F. B.) It may be observed, however, that under the *express* provisions of sec. 255 of the Code of Civil Procedure, the property of the judgment-debtor may be attached (by way of attachment before judgment) lest he should alienate such property before the amount of mesne profits is ascertained

Decree, when *operative*.

Cl. 2. Where there has been an appeal.

The meaning of the words "where there *has* been *an* appeal," or of the words "*the final* decree or order of the Appellate Court," has not yet been definitely settled. There can be *no doubt*, however, that where the law *allows* an appeal from the decree or order, which is sought to be executed, and an appeal has been actually preferred against such decree or order, and *admitted* by the Appellate Court, the date of the final decree or order of the Appellate Court is the point from which limitation runs. (See *Dianatullah* v. *Wajid*, I. L. R., 6 All., 438.) But it is *not necessary* that the appeal should be "admitted." If an appeal has been "presented," limitation begins to run from the date of the final decree or order of the Appellate Court, even if such appeal was *rejected* on the ground that it was barred by limitation. (*Akhoy* v. *Chunder*, I. L. R., 16 Calc., 250.) See also *Rupsing* v. *Mukraj*, I. L. R., 7 All., 887. An order of the Appellate Court permitting the *withdrawal* of an appeal cannot be treated as if it were a "decree." The withdrawal of the appeal renders it unnecessary for any decree to be drawn up, and the only decree which can be *executed* is that which was passed by the original Court. (*Pattoji* v. *Ganu*, I. L. R., 15 Bom., 370; *Chudasama* v. *Mahant*, I. L. R., 16 Bom., 243, at p 248; *Manavikraman* v. *Uniappan*, I. L R., 15 Mad., 170 at p. 173.) But *limitation* under cl. 2 of art. 179 runs from the date of the final decree *or order* of the Appellate Court. Even if the order allowing withdrawal is not a decree, it cannot be denied that it is the final order by which the appeal is disposed of by the Appellate Court. (See *Wazir Mahton* v. *Lalit Singh*, I. L. R., 9 Calc., 100.)

Presented, not admitted.

Effect of withdrawal.

The period of limitation is not to be computed from the date of the original decree, although that decree is *affirmed* by the Appellate Court. (See *Luchman Pershad* v. *Kishun Pershad*, I. L. R., 8 Calc., 218, F. B.; and *Ramchurn* v. *Lakhikant*, 16 W. R., F. B., 1; *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203) The decree of the Appellate Court is the final decree, and *the* decree in the case whether the decree of the lower Court is reversed, or modified or affirmed. (*Ibid.*) It has been held, in some cases *unconnected* with the interpretation of *this* article, that an order allowing an appeal to be *withdrawn*, or dismissing an appeal for *default*, cannot be treated as the final decree in the case. (See *Hingan* v. *Ganga*, I. L. R., 1 All., 293; *Gour Chunder* v. *Gour Mohun*, 5 W. R., Misc., 11; *Virasami* v. *Monnomany*, 4 Mad., 32. *Patloji* v. *Ganu*, I. L. R., 15 Bom., 370; *Manavikraman* v. *Unniappan*, I. L. R., 15 Mad., 170 at p. 173.) Similarly, it has been said that an order *dismissing* a special appeal *without confirming* the decree of the lower Court does not *supersede* such decree. (*Kristo Kinkur* v. *Borodakant*, 17 W. R., 292, 297, P. C.) But these questions do not

Decree affirmed, reversed, or modified.

Appeal withdrawn or dismissed.

arise under cl. 2 of art. 179. Limitation as regards the execution of the original decree runs from *any final order* passed on the appeal. The *last decree*, however, should be regarded as the decree to be *executed*, whether it reverses, modifies, or confirms. When the Appellate Court *affirms* and adopts the mandatory part of the *first* Court's decree, that decree may be and should be *referred* to, and the mandatory part of it so affirmed should be executed as though it was the decree of the Appellate Court. But where the Appellate Court *dismisses* the appeal *without affirming* the decree of the lower Court, it is the *lower* Court's decree which must be *executed*. Where the Appellate Court's decree has not embodied in its decree the mandatory part of the decree it intended to *affirm*, that decree, though superseded, must be *referred* to. (*Gobardhan* v. *Gopal*, I. L. R., 7 All., 366; *Shohrat* v. *Bridgman*, I. L. R., 4 All., 376. *Kristokinkur* v. *Burrodakant*, 17 W. R., 292, P. C.) This question has been fully discussed in the case of *Muhammad* v. *Muhammad*, I. L. R., 11 All., 267 F. B. The effect of sec. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court, even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under sec. 206 is the decree to be executed, and the decree to be executed is that of the Appellate Court, and not the superseded decree of the first Court. (*Ibid.* See p. 877 *supra*.) The final decree of the Appellate Court is the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it. (See *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203; *Nanchand* v. *Vithu*, I. L. R., 19 Bom., 258.)

Which decree is to be *executed*.

Appeal disposed of *after* application.

Even where execution was applied for *before* the date of the Appellate Court's decree, the decree-holder will, in a *subsequent* application, be entitled to compute the period of limitation from the date of the Appellate Court's decree. (*Venkatarayalu* v. *Narasimha*, I. L. R., 2 Mad., 174. *See* also *Narsing* v. *Narain*, I. L. R., 2 All., 963.) The dismissal of an application to execute the decree of the first court does not operate by way of *res judicata*, and cannot preclude the decree-holder from executing the decree of the Appellate Court. (*Nanchand* v. *Vithu*, I. L. R., 19 Bom., 258.)

Where the law allows no appeal.

It has been held by the Calcutta High Court, that *even* in a case where the law *does not allow an appeal* from a decree, the order of the Court to which an appeal has *actually* been *preferred*, rejecting the appeal on the ground that no appeal would lie, is the final order from which limitation runs. (*Wazir Mahton* v. *Lulit Sing*, I. L. R., 9 Calc., 100.) In this case it was observed by the Court that *any* order by which an appeal is disposed of, is the final order of the Appellate Court.

Order *rejecting* an appeal as insufficiently stamped, or barred.

It was held by a Division Bench of the Allahabad High Court that where an appeal was presented but *not admitted or registered*, on the ground of deficiency of the *Court-fees*, it could not be said that there "has been an appeal" within the meaning of this article. (*Dianat* v. *Wajid*, I. L. R., 6 All., 438.) But it has been held by the Calcutta High Court that if a memorandum of appeal is presented in the manner prescribed in sec. 541 of the Civil Procedure Code, that is to say, presented by a proper person to the proper Court, even an order *rejecting* the appeal on the ground that it was after time, is an "order of the Appellate Court" within the meaning of cl. 2 from the date of which order the three years may be counted. (*Akshoy* v. *Chunder*, I. L. R., 16 Calc., 250.) And in

Rupsing v. *Mukraj*, I. L. R., 7 All., 887, it has been held that an order *rejecting* an appeal on the ground of deficient payment of *Court-fee* is equivalent to a *decree*, and gives a new start. Act VI of 1892 and sec. 582A of the Code of Civil Procedure now *expressly* enact that if the deficiency is made up when required by the Court, the presentation, by mistake, of an appeal (or an application for review) on insufficient Court fee is not an invalid presentation. Act VI of 1892.

The language of this clause is not inapplicable to cases where a *part* only of a decree has been appealed against. But it has been held that where one of three defendants against whom a decree has been passed appeals against the decree only so far as it affects *himself* and his *share* of the property, or where the decree against which he prefers an appeal does not proceed on any ground *common* to all the defendants, the appeal does not prevent time from running so far as the non-appealing defendants are concerned. Where, however, an appeal by one imperils the *whole* decree (*see* sec. 544 of the Code), time does not run against the decree-holder, even so far as the non-appealing defendants are concerned. (See *Wise* v. *Rajnarain*, 10 B. L. R., 258 ; 19 W. R., 31 F. B. ; *Hur Prosad* v. *Enayet*, 2 C. L. R., 471 ; *Mullick* v. *Mohamed*, I. L. R., 6 Calc., 194 ; *Sungram* v. *Bujarat*, I. L. R., 4 All, 36 ; *Mashiatunnissa* v. *Rani*, I. L. R., 13 All., 1, F. B.) In *Gangamoyee* v. *Shib Sunker*, 3 C.L.R., 430, and *Basant Lall* v. *Najmunnissa*, I. L. R., 6 All., 14, this qualification of the language of the article does not appear to have been approved of. In the former case it was observed that in cl. 2 of this article, "there are no qualifying words as to *by* whom the appeal is to be made, or what the *nature* of this appeal to be made should be; but simply that when there *has* been *an* appeal, time shall begin to run from the date of the *final* decree or order of the Appellate Court." In *Nural Hossein* v. *Muhammad Hossein* (I. L. R., 8 All., 573), where a suit for pre-emption was decreed in March 1882, against the vendor, the purchaser, and another set of pre-emptors, and the appeal which the last-mentioned defendants alone preferred was dismissed in May 1882, it was held that even as against the purchaser who did not appeal, the plaintiff was entitled to execute his decree within three years of May 1882. But here the *whole* of the decree was imperilled by the appeal. In *Raghunath* v. *Abdul*, I. L. R., 14 Calc., 26, it has been held that where there are really separate decrees (though in one and the same piece of paper) against each of several defendants who had no such common interest, that an appeal by one would imperil the *whole* decree, or *all* the separate decrees, an appeal against one of such decrees will *not* give the decree-holder an extended time as regards the other decrees. It has been held in Madras that even where *all* the parties to the suit were parties to the *appeal*, if the appeal did not imperil the first Court's decree so far as it related to the property of *some* of the defendants, it could not extend the time for executing the decree against those defendants, and that an appeal as to *costs* only cannot affect the decree for the *property*. (*Muthu* v. *Chillappa*, I. L. R., 12 Mad., 479.) The literal interpretation of the terms of clause 2 of art. 179 in favour of the right to sue out execution is favoured by the learned Judges who decided the cases of *Gungamoyee* v. *Shib Sunker*, 3 C. L. R., 430 ; *Nur-ul-Hossan* v. *Muhammad*, I. L. R., 8 All., 573 ; *Nundunlal* v. *Rai Joy Kishen*, I. L. R., 16 Calc., 598 ; *Kristo* v. *Radha*, I. L. R., 19 Calc., 750 ; and by the minority of the Judges in *Mashaotunissa* v. *Rani*, I. L. R., 13 All., 1 F. B. But the *literal* interpretation of cl. 2, art. 179, has been modified by judicial decisions, and the rule governing these cases appears to be shortly this, that unless

1. Appeal *imperilling whole* decree.

2. Any appeal by any party.

1. Imperilling whole decree.

Appeal as to costs only.

2. Literal interpretation.

Literal interpretation how far modified by judicial decisions.

the *whole* decree was *imperilled* by the particular appeal which was preferred, the decision in the appeal would not alter the period of limitation in respect of the execution of the decree as between *other parties* to the suit. (*Nundunlal Rai* v. *Joykishen*, I.L.R., 16 Calc., 598.) Where *all* the parties to the suit were parties to the appeal, and the Appellate Court *could*, if it thought right, *alter* the decree against any of them, the Court is not bound before allowing execution to go into all the circumstances of that appeal, and to consider whether the original decree against any of the parties was imperilled by the appeal or was in all probability practically secure. (*Kristo* v. *Radha*, I. L. R., 19 Calc., 750.) It has recently been held by Edge, C.J., and Banerjee, J., that where *all* the parties to the suit were parties to the appeal, the final decree in the suit between the parties is the decree of the Appellate Court, although the appeal related only to a *part* of the subject matter of the suit, and that the decree-holder is entitled to count the three years from the date of the appellate decree even as regards property which was not a subject matter of the appeal. (*Badiunnissa* v. *Shams-ud-din*, I. L. R., 17 All., 103.) See also *Sakhalchand* v. *Velchand*, I. L. R., 18 Bom., 203. But as to the *part* which was not a subject-matter of the appeal, see I. L. R., 12 Mad., 479, and I. L. R., 9 Calc., 635.

Where all are parties to the appeal.

Where second appeal imperils lower appellate Court's order of remand.

A sued B for possession of certain land and to recover damages. The Munsiff decreed possession, but dismissed the claim for damages. On appeal, the Judge affirmed the decree for possession, and remanded the case for adjudication as to the amount of damages due. In special appeal to the High Court, the Judge's decision as to possession was modified, but his order of remand was not interfered with. In the *meantime*, the Munsiff decreed damages, and on appeal that decree was confirmed by the Judge. An application for execution of this second decree of the Judge is not barred if made within three years of the decree of the High Court. (See *Imam* v. *Dassaundhi*, I. L. R., 1 All., 508.) In this case the appeal to the High Court against the *whole* decree *imperilled* the Judge's order remanding the case as to the claim for damages, and the second decree of the Judge awarding damages *might* have been nullified, if the High Court had interfered with the order of remand. Where, however, a suit for possession of land and moveable properties having been decreed, defendant appealed as regards the *moveables only*, no question being raised in the Appellate Court in the matter of the land, it was held that (under sec. 20, Act XIV of 1859, which made no reference to *appeals*) the appeal and plaintiff's appearance in the Appellate Court to resist the appeal did *not* serve to keep in force the decree for the *land*. (*Sreenath* v. *Brojonath*, 13 W. R., 309.) Where the High Court, affirming the Judge's decision in part, remands the case for further investigation on certain points, and a final decree then passed by the Judge is subsequently upheld by the High Court in its entirety, limitation runs from the date of this *last* judgment. (*Shaik Fuzl* v. *Doolun*, 5 W. R., Misc., 6.) Under Act XIV of 1859, there was no express rule postponing the starting point of limitation in cases where the decree of the first Court was appealed against until the decision in appeal, and the question consequently arose in cases where an appeal was preferred, which should be regarded as *the decree to be executed*. (See 3 Mad. Law Journal, 19.) Where *a part* only of the decree against the defendant was appealed against, it was held that the *other part* must be enforced by execution within three years from the date of the original Court's decree. (*Sreenath* v. *Brojonath*, 13 W. R., 309.) Where under the decree each of two defendants was *separately* liable for definite sums of money, it was held that the decree, although it was made in one suit, and

Rulings under the old law.

written in one piece of paper, was in reality and substance a *separate* decree against each for the portion for which each was declared to be liable. Such a decree was treated as in fact two decrees. It might be *otherwise* where there was a community of interest between the defendants, and the decree was a *joint* decree against them all. (*Wise* v. *Rajnarain*, 19 W. R., 30 F. B.) Even where the decree was made collectively against the defendants, and one of the defendants preferred an appeal, not against the *whole* decree so as to give the Appellate Court jurisdiction to reverse the decree altogether, but only so far as his own 10 pie share was concerned, it was held that, as this appeal did not imperil the whole decree, execution as against the non-appealing defendants must be taken out within three years of the original decree. (*Hur Proshaud* v. *Enayet Hossein*, 2 C. L. R. 471.) It was observed in this case that "The reason for suspending the operation of the law of limitation during the pendency of an appeal is, that it is manifestly undesirable to force an execution of a decree, while there exists any *doubt* as to the rights of the decree-holder against the appellant." These decisions have been followed even in cases under Act IX of 1871 and Act XV of 1877, though the literal interpretation of these later Acts is in favor of the opposite view. See the judgment of the majority of the Judges in *Mashiatunnissa* v. *Rani*, I. L. R., 13 All., 1 F. B., of Ayyar and Wilkinson, JJ., in *Muthu Chellappa*, I. L. R., 12 Mad., 479. But compare the judgment of Pigot and Macpherson, JJ., in *Kristo* v. *Radha*, I. L. R., 19 Calc., 750; and of Edge, C.J., and Banerjee, J., in *Budiunnissa* v. *Shamsuddin*, I. L. R., 17 All., 103. See p. 902 *supra*.

Separate decrees in one piece of paper.

Appeal as to one defendant's share.

Rulings under the old law, generally followed.

The appeal referred to in this clause is apparently an appeal from the decree or order which is sought to be executed, and not an appeal from an order dismissing an application to set aside the decree under sec. 108 of the Code. (See *Sheo Persad* v. *Aurudh*, I. L. R., 2 All., 273.) But in *Lutful Huq* v. *Shumbhudin*, I. L. R., 8 Calc., 248, it was held that, as such an appeal really *kept the decree open*, it *was* an appeal within the meaning of this clause. But the decision in Lutful Huq's case appears to have been disapproved in *Baikanta* v. *Aughore*, I. L. R., 21 Calc., 387 at pp. 390, 391; and in *Jivaji* v. *Ram Chandra*, I. L. R., 16 Bom., 123. It has been held that, where an appeal from a decree passed on a *review* of judgment sets aside the decree made on review, an application to execute the *original* decree is not barred, if it is made within three years of the order in the appeal. (*Narsing* v. *Madho*, I. L. R., 4 All., 274.) Clause 3, read with clause 2, may justify this decision. An appeal from an order passed in *course of execution* of a decree is *not an appeal* within the meaning of this clause. Though where the order of the Appellate Court in the execution proceeding is itself capable of being executed, an application for the execution of such order will not be barred if made within three years from the date of the order. (See *Hulasi* v. *Maiku*, I. L. R., 5 All., 236.) Resisting an appeal preferred by the judgment-debtor from an order in an *execution* proceeding is not sufficient to keep alive the original decree. (*Kristo Coomar* v. *Mahabat*, I. L. R., 5 Calc., 595.)

Appeal from orders in *proceedings after* decree.

On review.

In execution.

The word 'appeal' includes an appeal to Her Majesty in Council, and the Judicial Committee of the Privy Council is an "Appellate *Court*" within the meaning of this article. (*Narsing* v. *Narain*, I. L. R., 2 All., 763. See also *Gopal* v. *Joyram*, I. L. R., 7 Calc., 620.) If the application is to enforce an order of Her Majesty in Council affirming a decree of the High Court on its *appellate* side, art. 180 will govern the case, in the same way as it governs such

Appeal includes appeal to Privy Council.

P. C. Appeal.

orders on appeals from the *original* side of the High Court. (*Luchmun* v. *Kishun Persad*, I. L. R., 8 Calc., 218, F. B.; *Futteh Narain* v. *Chundrabati*, I. L. R., 20 Calc., 551.) When a decision of the Judicial Committee of the Privy Council has been reported to Her Majesty, and has been sanctioned and embodied in an order in Council, it becomes the decree or order of the final Court of appeal. (*Pitts* v. *La Fontaine*, L. R., 6 App. Cas., 482.) The rule laid down in Luchman's case applies whether the Privy Council reverse or affirm the decision of the High Court. (I. L. R., 20 Cal., 551.) If, however, the application is only to execute the decree of the High Court, the order of Her Majesty in Council will give the decree-holder a new start, under cl. 2, art. 179. (*Narsingdas* v. *Naraindas*, I. L. R., 2 All., 763.)

Cl. 3. Where there has been a review.

"(Where there has been a review of judgment) the date of the decision passed on the review." It is only where an application for a review has been *granted* and a decision passed on review, that this clause applies. The time during which an application for a review was pending cannot be excluded in computing the period of limitation if the review was refused. (See *Kurupam* v. *Sadasiva*, I. L. R., 10 Mad., 66.) Where there has been a *review* of judgment, and an *appeal* from that judgment, the three years run from the date of the final order of the Appellate Court. (*Narsing* v. *Madho*, I. L. R., 4 All., 274.)

Review of a *part*.

This clause does not indicate as to how time should run when the review is confined to a *part* only of the judgment and decree. But it has been held (in a case unconnected with the construction of this clause) that even where the application for review is granted in *part*, the amended decree is *the final* decree in the case. (*Joykissen* v. *Ataoor*, I. L. R., 6 Calc., 22.)

Resisting appeal or review.

Under Act XIV of 1859, though an *application* for review did not keep a decree alive, *opposition* to the application by the decree-holder was treated as a proceeding taken for *keeping* the decree *in force*. (*Bibee Luteefun* v. *Raj Rup*, 19 W. R., 185.) Resisting an appeal or a review does not give a new start under Act XV of 1877. *Resisting* is not *applying*. Besides, in the case of an appeal, nothing is done in the *proper* Court, that is, in the first Court. (See *Kristo* v. *Mahabat*, I. L. R., 5 Calc., 595.)

New trial and amendment of decree.

Art. 179 is silent as to cases where there has been a "new trial," or where a decree has been *amended* under sec. 206, Civil Procedure Code. (As to amendments, see *Kishon* v. *Collector*, I. L. R., 4 All., 137; *Tarsiram* v. *Mansing*, I. L. R., 8 All., 492.) In this last case Mahmud, J., was of opinion that the amendment of a decree did *not* furnish a fresh starting point of limitation. Sec. 206 contemplates that the *judgment* is correct. An application under that section is not therefore an application for a review of judgment. An order under that section does not give a fresh start. (*Kallu* v. *Fahiman*, I. L. R., 13 All., 124.) For an exceptional case, see *Muhammad* v. *Muhammad*, I. L. R., 17 All., 39.

Cl. 4.

Under cl. 4 of art. 179, limitation runs from "the date of *applying* in accordance with *law* to the *proper* Court for *execution*, or to take some *step in aid of execution* of the decree or order."

Proceeding to enforce or keep in force the decree under Act XIV, 1859.

Under sec. 20, Act XIV of 1859, limitation ran from the time of "some *proceeding* to *enforce* the decree or order, or to *keep* the same *in force*." Under arts. 167 and 168 of Act IX of 1871, limitation ran from "the date of *applying* to the Court to *enforce* or *keep in force* the decree or order." Under Act XIV, every application for

execution *bonâ fide* made, and all acts done either by the Court or by an officer of the Court or *bonâ fide* by the applicant, for enforcing a decree or keeping it in force, was sufficient to keep alive the decree. But the mere pendency of proceedings struck off the file for *want of prosecution* was not sufficient. (*Ram Sahaye* v. *Degun Singh*, 6 W. R., Misc., 98, F. B) A merely *colorable* proceeding taken to save the time was insufficient. (*Tabbur* v. *Motee*, 8 W. R., 306) As to what was or what was not evidence of *bonâ fides*, see *Benoderam* v. *Brojendro*, 21 W. R., 97 P. C. So long as there was a *litis contestatio* between the parties, the *pendency* of a *bonâ fide* proceeding in which such contest arose took the case out of the operation of limitation. (*Maharajah Mahtabchand* v. *Bulram*, 14 W. R., P. C., 21.) Where an execution-sale was stayed on condition that the subsisting attachment should remain in force, the striking off of the execution-proceedings did not affect the rights of the decree-holder. (*Mungul Persad* v. *Grijakant*, I. L. R., 8 Calc., 15, P. C) An attachment operated as a continuing proceeding. (4 Mad., 316.) A *bonâ fide* application made to a Court *without jurisdiction* might be sufficient. (*Hiralall* v. *Badridas*, I. L. R., 2 All., 792, P. C.) *Bonâ fide* proceedings in *resistance* of a *claim* to property attached in execution were proceedings under sec. 20, Act XIV. of 1859. (*Becharam* v. *Abdul*, I. L. R., 11 Calc., 55.)

Rulings under Act XIV, 1859.

Under Act IX. of 1871, a perfectly abortive application which was *meant* by the execution-creditor to be abortive, and under which nothing whatever was done, served to keep the decree alive for three years from the date of such application. It was *not* necessary that the application should have been made *bonâ fide* with the object of reaping the fruits of the decree. (*Eshan Chunder* v. *Prannath*, 22 W. R., 512, F. B; *Faez Bux* v. *Sadut Ali*, 23 W. R., 282.) *The pendency* of an application did not serve to keep the decree in force. Limitation commenced to run from the date of the application, and not from the date when such application was disposed of. (*Faez Buksh* v. *Sadut Ali*, 23 W. R., 282.) It was otherwise under Act XIV. of 1859. (*Shurut* v. *Abdool*, 23 W. R., 327.)

Applying to enforce or keep in force the decree under Act IX. of 1871.

It was at first laid down by the Calcutta High Court that an "application to *enforce* a decree" in Act IX. of 1871 meant an application under sec. 212, Act VIII. of 1859 (corresponding to sec. 235 of the present Civil Procedure Code), by which proceedings in execution were *commenced*, and not an application of an incidental kind made during the pendency of such proceedings. (*Chunder Coomar* v. *Bhogobatty*, I. L. R., 3 Calc., 235, F. B.) It was also suggested in this last case that under Act IX. the decree-holder could apply to the Court *simpliciter* "to keep the decree in force," and that he could get a new start from the date of such application. See also *Raja Nilmoney Sing* v. *Nilcomul*, 25 W. R., 546; *Probhacar* v. *Pottaunah*, I. L. R., 2 Mad., 1. In *Ambica Persad* v. *Sardhari Lall* (I. L. R., 10 Calc., 851, F. B.) Sir R. Garth, C.J., explained the former Full Bench ruling and declared that the language used by the Court on that occasion was unduly narrow. An application for the issue of a sale proclamation during the pendency of an execution proceeding *is*, it has been pointed out, an "application to *enforce* the decree"; but *payment* into Court of the costs of a proclamation of sale by *challan* is not such an *application*. The learned Chief Justice did not in this case say anything as to the meaning of the words "to keep the decree in force." In *Jamnadas* v. *Lalitram*, I. L. R., 2 Bomb., 294, an application (in a pending execution case) to *continue* the

Keeping a decree in force.

Applying to continue attachment.

attachment of property (already attached, but objected to) was considered to be an application to *keep the decree in force*. An application merely to *continue* the attachment of property already attached has merely the effect of having things precisely as they were, and *not advancing* the execution in any respect whatsoever. Such an application may "keep the decree in force" within the meaning of art. 167 of Act IX. of 1871 (*Nukanna* v. *Ramasami*, I. L. R., 2 Mad., 218), but it is not a step in *aid* or in *furtherance* of the execution of the decree within the meaning of cl. 4, Act XV. of 1877. (*Abdul* v. *Fazilun*, I. L. R., 20 Calc., 255.)

Keeping a decree in force.

An application *simply* asking the Court "to keep the decree in force" is seldom heard of in practice, and is not provided for or contemplated in the Code of Civil Procedure. The interpretation which was put upon the same words in sec. 20 of Act XIV. of 1859 was probably adopted by the Legislature in 1871. But that which was a *proceeding* under Act XIV. was not necessarily an *application* under Act IX. The words "to enforce" or "to keep in force" are not to be met with in cl. 4 of art. 179 of the present Limitation Act. The words "to take some step in aid of execution" are in some respects somewhat more comprehensive. (See *Ambica Persad* v. *Surdarilall*, I. L. R., 10 Calc., 851, 855.) But compare *Abdul* v. *Fazilun*, I. L. R., 20 Calc., 255. These words or any other words in art. 179 do not cover an application which *simply* asks the Court "to keep the decree in force." Such an application is not made in accordance with any provisions of the Code, and cannot give a new start. (*Gurupadapa* v. *Virbhadrapa*, I. L. R., 7 Bomb., 459.)

Cl. 4, Act XV.

The point from which limitation runs under this clause is the date of *applying* for *execution* as contemplated by sec. 230 and sec. 235 of the Civil Procedure Code (see *Tarachand* v. *Kashinath*, I. L. R., 10 Bomb., 62, 64; *Chunder* v. *Bhogobutty*, I. L. R., 3 Calc., 235; *Probhacar Row* v. *Pattaunah*, I. L. R., 2 Mad., 1), or the date of *applying* to take some *step* in aid of execution. An application for execution is an application made under the first paragraph of sec. 230 of the Civil Procedure Code, and in accordance with the provisions of sec. 235 and the following sections of the Code. It is an application setting the Court in motion to execute a decree in any manner set out in the last column of the form prescribed by sec. 235; but having so set the Court in motion, any *further* application, during the continuance of the same proceeding (such as an application for the sale of property already attached), is an application to take some "step in aid of execution," within the meaning of the latter part of clause 4. (*Chowdhry Paroosh Ram* v. *Kali Puddo*, I. L. R., 17 Calc., 53.) In order to get a new start under the *first* part of clause 4, the decree-holder must shew that he made a *direct and independent application* for execution of his *own* decree. The *latter* part of clause 4 refers to an application to obtain some order of the Court in *furtherance* of the execution of the decree. (*Umes* v. *Soonder*, I. L. R., 16 Cal., 747.) *Resisting* or offering objections to an attempt on the part of the judgment-debtor to set off the amount of the decree against the amount due to himself is *not applying* to execute or to take some step in aid of execution, and therefore *not* sufficient. (*Shiblal* v. *Radha Kissen*, I. L. R., 7 All., 898.) *Appearing* to oppose the debtor's application to set aside an execution sale is not applying to take a step in aid of execution. (*Umesh* v. *Soonder*, I. L. R., 16 Calc., 747.) Prosecuting a *suit* to set aside an order for the release of property attached is not taking a step in aid of execution within the mean-

1. Applying for execution.

2. Applying to take some step in aid of execution.

What is *not* "applying."

ing of clause 4; though such a suit, if successful, may entitle the decree-holder to treat his subsequent application for execution against the same property as a *continuance* of his former application. (See *Roghunundun* v. *Bhugoolall*, I. L. R., 17 Calc., 268.) The application under cl. 4 must be made to the *proper* Court and in accordance with *law*. The question of the *bonâ fides* of the application does not arise under this Act, as it did not under Act IX of 1871. The fact that a proceeding in execution has been pending for some time is not taken into consideration. It is the date of *applying* to the Court to *commence* execution-proceedings, or to *take some step* during the pendency of such proceedings, which has to be considered. (*Jibhai* v. *Parbhu*, I. L. R., 1 Bomb., 59) The date of applying means not any day on which an application may be *pending*, but a certain day, the day when it is made or presented. (See *Fakir* v. *Ghulam* I. L. R., 1 All., 580, F. B.) The date of the application is the date on which it is presented, and not the date on which the Court takes proceedings thereon. (*Faez Bux* v. *Sudah Ali*, 23 W. R., 282.) The *termination* of an execution-proceeding does not give a new start, but if an application properly made has not been finally disposed of in consequence of an injunction or some other obstacle, the decree-holder may treat his former application as still subsisting, and (within three years of the removal of the obstacle) ask the Court to proceed upon it. (See *Kalyanbhai* v. *Ghanasham*, I. L. R., 5 Bom., 29; *Issurree* v. *Abdool*, I. L. R., 4 Calc., 415; *Chandra* v. *Gopimohun*, I. L. R., 14 Calc., 385; *Baikanta* v. *Aughore*, I. L. R., 21 Calc., 387 at p 391; and the notes to sec. 15 and art. 178.) If after the removal of the obstacle the decree-holder asks the Court to issue a *new process* of attachment or arrest for which he had not applied before, his application must be treated as a fresh application for execution, and not merely as an application to *continue or revive* the former proceeding. (*Krishnaji* v. *Anandrav*, I. L. R., 7 Bomb., 293; *Khairunnissa* v. *Gauri Shankar*, I. L. R., 3 All., 484; *Virasami* v. *Athi*, I. L. R., 7 Mad., 595; *Ramsundur* v. *Gopessur*, I. L. R., 3 Calc., 716; *Raghunundun* v. *Bhugoo Lall*, I. L. R., 17 Calc., 268.) A subsequent application for execution is a continuation or revival of a previous application, only where the previous execution proceeding was either interrupted or rendered infructuous by an intermediate order which is afterwards set aside; and where such (subsequent) application *could not* have been made for a term, by reason of the state of things that intervened. If the intermediate obstacle did *not* prevent the decree-holder from proceeding against a part of the property, the removal of the obstacle would not entitle the decree-holder to take advantage of this rule so far as *that part* is concerned. (*Ibid*, see also pp. 880, 888 *supra*.) Where money deposited in Court, or the proceeds of property sold in execution, are paid to the decree-holder, and the execution-proceedings are finally disposed of, but for some reason or other the decree-holder, being obliged to *refund* the money, applies for execution, his application is not *necessarily* an application to *continue* the former proceedings. (See 24 W. R., 143; I. L. R., 3 All., 484, and I. L. R., 7 Mad., 595.) It has been held, not without advertence to *Rani Sarnomoyi* v. *Shoshimuki*, 11 W. R., P. C., 5 (see p. 154, *supra*) that where a decree-holder is obliged to *restore* the advantage previously received by him by execution-proceedings (*Syud Abdool* v. *Kanchan*, 24 W. R., 143), or to make compensation for it (*Khairunnissa* v. *Gauri Sankar*, I. L. R., 3 All., 484), he cannot claim a fresh period of three years from the date of his losing the benefit of the previous execution-proceedings,—*except* where the subsequent application to re-execute his decree can be regarded as a *con-*

Applying *legally* to *proper* Court.

Date of applying.

Prior application may subsist, and be proceeded upon after an interval.

When such prior application may be so *revived* or *continued*.

Re-executing a decree on its satisfaction being nullified.

Applying again on satisfaction of decree being nullified.

tinuance or revival of the former proceedings. (*Virasami* v. *Athi*, I. L. R., 7 Mad., 595.) In *Issuree Dassi* v. *Abdool Kholack* (I. L. R., 4 Calc., 415) the facts stated in the report do not show that the subsequent application was for attaching the property which had been previously attached and sold, but the Court held that the application was in substance an application to *continue* the proceedings already commenced by the preceding application, and *as such* not barred by limitation. When the *judgment-debtor* succeeds in setting aside the sale on the ground of irregularity or otherwise, and the judgment-creditor is obliged to refund the sale-proceeds, an application by the latter to execute his decree by *re-attaching* the property of which the sale has been set aside is undoubtedly a *continuance* of the former proceedings, and is not barred if made within three years of the setting aside of the sale. (See p. 888, *supra*.) But if that by which the decree was previously satisfied is set aside or nullified at the instance of a *third* party, so that the decree-holder is obliged to apply to the Court for the issue of a *new* process against a new property, or against the person of the debtor, his application, if not made within the time prescribed by the several clauses of art. 179, would be barred by limitation (I. L. R., 7 Bomb, 293; I. L. R., 7 Mad, 595). As to applications (made after the 12 years allowed by sec. 230) for the attachment of properties *not mentioned* in previous applications being treated as *fresh* applications, see *Sreenath* v. *Yusuff*, I. L. R, 7 Calc., 556. But cf., I. L. R., 14 Calc., 124, and I. L. R., 17 Calc., 631.

Applying to execute the decree in accordance with *law*.

An application for the execution of a decree made to a proper Court by a proper person is an application made according to *law*, although, on considering the application with the decree, the Court may refuse the order sought on the ground that it is not warranted by the terms of the decree. An application incorrect in *some* respects, as where there is a wrong calculation of interest and costs, is not invalid. (*Ramanandan* v. *Pereatambi*, I. L. R., 6 Mad., 250.) Such an application may *further* execution, since it asks for what the decree gives, and so could be accepted, and, when the mistake has been corrected, acted upon. But where the relief asked for is *outside and beyond the decree altogether*, or, where execution is asked for in a *way different* from that provided by the decree, the application cannot be treated as one made in accordance with *law* to execute or further the execution of *the* decree. (*Pandari* v. *Lilachand*, I. L. R., 13 Bomb, 237) The words "in accordance with law" mean in accordance with the law relating to execution. (*Balkishen* in *Bedmati*, I. L. R., 20 Calc., 388.) The provisions of the Code of Civil Procedure and the Limitation Act relating to execution should be (substantially) complied with before the application can be treated as made "in accordance with law." (*See Nilmony* v. *Ramjeebun*, 8 C. L. R., 335.) It has been held that an application to do something which to the decree-holder's direct knowledge or from his presumed knowledge of law he must have known the Court was incompetent to do, is not an application made "in accordance with law." An application to have the judgment-debtor re-arrested in execution of decree, in *contravention* of the terms of sec. 341 of the Code, and a mortgagee's application to bring the mortgaged property to sale, in contravention of sec. 99 of the Transfer of Property Act, IV of 1882, it has been held, are not applications in accordance with law. (*Chattar* v. *Newal*, I. L. R., 12 All., 64.) An application *not* asking the Court to do one of the things which that Court is empowered or required to do by law for the purpose of executing or assisting to execute the decree is *not* an application in accordance with law. (*Aughore* v. *Prosunno*, I. L. R., 22 Calc. 827.) Whether the

"In accordance with law."

provisions of an Act which was passed *after* Act XV of 1877 (*e.g.*, the Succession Certificate Act, VII of 1889) should be taken into consideration in interpreting cl. 4 of art. 179 has been decided in the negative by O'Kinealy and Banerjee, JJ., in *Hafizuddin* v. *Abdool*, I. L. R., 20 Calc., 755. But the term 'law" in cl. 4 of Act XV of 1877 has always been held to include the provisions of the Civil Procedure Code of 1882 And the provisions of sec 89 of the Transfer of Property Act, IV of 1882, have been taken into consideration, in interpreting the words "applying in accordance with *law*." (See I. L. R., 12 All, 64, and p. 908 *supra*) A mere technical defect in the application for execution, such as not describing the person against whom execution is sought as the *guardian* of the real judgment-debtor, does not necessarily vitiate the application. The decree in this case was obtained against a minor represented by his mother, and application for execution was made against the mother only. (*Hari* v. *Narayan*, I. L. R., 12 Bomb., 427.) Where some of the defendants had been ordered to defend the suit on behalf of their minor co-defendants, and they practically did so, and continued to do so in *execution* proceedings, the omission formally to appoint them as guardians *ad litem* in the execution proceedings is an error of *form*, and not fatal to the legality of those proceedings (*Timmappa* v *Shesho*, 3 Mad Law Journal, 264) In this case the debtor was substantially and for all practical purposes represented by the person against whom execution was sought An application for execution, even without production of a copy of the decree, is an application in accordance with law. (*Gopilandhu* v. *Domburu*, I. L. R., 11 Mad., 336.) No copy of the decree is required by law to be filed in execution. (*Rajkumar* v. *Rajlakhi*, I. L. R., 12 Calc., 441) In one reported case, it was held that a bare request in an application that the amount of the decree might be recovered, without any specification of the *mode* in which the Court was desired to *aid* in its recovery (as required by sec. 235 of the Code) was not an application for execution, although it asked for the issue of a notice on the judgment-debtor. (See *Franks* v. *Nunch*, 7 N. W., 79) But the correctness of this ruling has been impugned in *Beharilal* v. *Salikram* I. L. R., 1 All., 675. See also *Govind* v. *Appaya*, I. L. R. 5 Bomb., 246. Such an application is at least an application to take some step in *aid* of execution. (*Ibid.*) The applicant is bound to state the mode in which the assistance of the Court is required, whether by arrest or attachment or otherwise, and if he does not comply with these provisions of cl. (J), sec. 235, his application for execution, if not amended in proper time, must be rejected (*Shakaramchand* v. *Ghila*, I. L. R., 19 Bomb., 34.) This case, however, does not decide that such defective application cannot give a fresh start under cl. 4, art. 179. Even if a formally defective application for execution is returned for amendment, and the amendment is not made, such application may give a new start under cl. 4, art. 179, either as having *substantially* complied with the provisions of sec. 235 of the Code (*Rama* v. *Varada*, I. L. R., 16 Mad., 142; *Samia* v. *Chokalinga*, I. L. R., 17 Mad., 76) or at least as an application to take some *step* in aid of execution (*Govind* v. *Appaya*, I. L. R., 5 Bomb., 246.) Where there has been, in fact, an application for execution made by the party entitled to make it, the mere fact of a mistake having been made in giving the particulars required by sec. 235 of the Code cannot have the effect of rendering the application a nullity. This is the view adopted in *Ramanandan* v. *Periatambi*, I. L. R., 6 Mad., 250. and *Fuzloor* v. *Altaf*, I. L. R., 10 Calc., 541. An application for execution, which by mistake specified the name of one of many joint judgment-

Does "law" include *later* Acts?

Formal defects. As to guardianship of judgment-debtor.

Non-production of copy of decree.

Non-specification of mode of execution.

Effect of not amending application.

Mistakes and omissions.

Execution against a dead man or a person who is not the legal representative.

debtors, who was *dead* at the time of the application, as the person against whom execution was sought, has accordingly been held to have been an application in accordance with law within the meaning of art. 179. (*Samia* v. *Chakalinga*, 4 Mad. Law Journal, 8; I. L. R, 17 Mad., 76) (A *bona fide* mistake as to who is the legal representative of a deceased judgment-debtor does not vitiate an application for execution. (*Balkishen* v. *Bidmati*, I. L. R., 20 Calc., 338 at p 396) It has also been

Other legal defects.

held that a formal defect with reference to cl. (*f*) of sec. 235 (*e.g.* omitting to state a previous application and its result) does not vitiate the application. (*Rama* v. *Varda*, I. L. R., 16 Mad. 143.) Where, however, the property sought to be attached was not fully described, and a list of such property as required by sec. 237 was not put in, it was held that the application for execution by attachment was substantially defective and could not be carried out without amendment. (*Asgar* v. *Troilokhya*, I. L. R., 17 Calc, 631, F. B.) This last case, however, did not decide whether such defective application could not be treated as an application made in accordance with law, within the meaning of cl. 4, art. 179.

Not producing certificate of succession.

Although the Court can *not proceed* upon an application made by a representative of a deceased decree-holder, on or after the 1st of May 1889, for execution of a decree for the payment of a *debt* except on his producing a probate, letters of administration or a succession certificate (see Act VII. of 1889, sec. 4, and *Bulubhai* v. *Nasarbin*, I. L. R, 15 Bom., 79). yet an application made by such a representative unaccompanied by a certificate is a good application in law for the purposes of cl. 4. art. 179. (*Brojonath* v. *Iswar*, I. L. R., 19 Calc., 482; *Mongol* v. *Salim*, I. L. R., 16 All, 26; *Hafizuddin* v. *Abdool*, I. L. R., 20 Calc, 755) It has been observed that, as the Procedure Code and the Limitation Act came into operation long *before* the Succession Certificate Act, the provisions of the latter Act cannot affect the interpretation to be put on the word "application" as used in the former Acts. (I. L R, 20 Calc., 755 at p. 757. See however p. 909 *supra*.) As the certificate may be supplied during the pendency of the execution proceedings, an application unaccompanied by a certificate may be a good application for the purposes of art. 179, cl. 4. (See *Janki* v. *Hafiz*, I. L. R., 13 Calc., 47.)

Partial execution.

It has been held that an application for the *partial* execution of a *joint* decree by one of several decree-holders, though irregular, is an application which would serve to keep alive the right to execute. (*Ponnampilath* v. *Ponnampilath*, I. L. R., 3 Mad., 79; *Sibchunder* v. *Ramchunder*, 16 W. R., 29.) But such an application is *not* made in accordance with *law*, that is in accordance with the provisions of sec. 231 of the Procedure Code (See *Haro* v. *Tarak*, 11 W. R., 484; *Dalichand* v *Bai*, I L. R., 15 Bomb, 242; *Ram Autar* v. *Ajudhia*, I L. R., 1 All., 231; *The Collector* v. *Surjun*, I. L. R., 4 All, 72) In *Nandarai* v. *Raghunandun*, I. L. R., 7 All., 282, the Allahabad High Court has held that, where a *previous* execution by *some* sharers for their *shares* of the decree has been *allowed* by the Court, it is good for the purpose of keeping the decree alive, and that a subsequent application for the execution of the decree as regards those shares cannot be objected to. It has been held in Bombay that an application for partial execution of a decree, though not in accordance with law, is a step in aid of execution as contemplated by cl. 4. (*Kalidas* v *Varjivan*, I. L R., 15 Bom., 245; *Dalichand* v. *Bai Shivkor*, I. L. R., 15 Bom., 242.) In the last case it was held that such an application would give a fresh start, if the defendant did not object to it, but *allowed* an order to be

passed on it. As to the execution of a decree for *partition*, see pp. 878. 898, *supra*, and the Notes to Expl. 1, cl. 6, art 179 *infra*. Where the Court in execution can only forward copies of its decree for the *information* of the Collector, an application for the issue of *orders* to the Collector (in execution of a Civil Court decree in respect of certain settlement proceedings) has been held to be not "in accordance with law." (*Muhammad* v. *Kamila*, I. L. R., 4 All., 34.) It has been held by the Madras High Court that an application may have been made "in accordance with law," though it was *insufficiently stamped*. (*Ramasami* v. *Seshayyangar*, I. L. R., 6 Mad., 181.) An application by the assignee of a mortgage decree for execution under sec. 232 of the Code is a *step* in aid of execution, although the application was returned to the applicant on the ground that his deed of assignment had not been *registered* and could not be received as any evidence of the assignment. (*Abdul* v. *Muhammad*, I. L. R., 13 All., 89) It has been held by the same Court that an application which was otherwise correct and in due form, cannot be treated as a nullity, simply because it did not comply in *every* particular with the requirements of sec. 235 of the Civil Procedure Code, *e.g.*, because it miscalculated the interest or incorrectly stated the amount of costs incurred in former execution-proceedings. Even if the application was *returned* for amendment, and *nothing further was done upon it*, it would give a fresh starting-point from the date of its presentation. (*Ramanandan* v. *Periatambi*, I. L. R., 6 Mad., 250.) See also *Rama* v. *Varada*, I. L. R., 16 Mad., 142; *Hurry* v. *Subaydar*, I. L. R., 12 Calc., 161. There were conflicting rulings on the applicability of secs. 373 and 374 of the Civil Procedure Code, to *applications* for execution, and on the effect of such applications being *abandoned* or *withdrawn*. The ruling of the Madras High Court, just referred to (I. L. R., 6 Mad., 250), was dissented from in *Kifayat* v. *Ram Sing*, I. L. R., 7 All., 359. And it was held by the Allahabad High Court that under sec. 647, secs. 373 and 374 did apply to execution-proceedings. (*Sarju* v. *Sitaram*, I. L. R., 10 All, 71; *Radhachurn* v. *Mansing*, I. L. R., 12 All., 392 F. B.) But Sargent, C. J., in *Tarachand* v. *Kashinath*, I. L. R., 10 Bomb., 62 (dissenting from the rule laid down in *Pirjade* v. *Pirjadi*, I. L. R., 6 Bomb., 681). held that, notwithstanding sec. 647 of the Code, secs. 373 and 374 were not applicable to applications for execution, and that, therefore, even an application for execution which had been *withdrawn* by the decreeholder (with permission to apply again) would give the decreeholder a *fresh* start. (See also *Eshan* v. *Prannath*, 22 W. R., 512, F. B.; *Lala Hurree* v. *Krishna*, 25 W. R., 106.) The ruling in I. L. R., 6 Mad., 250, tends to support the view of Sargent, C.J., but Melville, J., in I. L. R, 6 Bomb, 681, Oldfield and Mahmud, JJ., in I. L. R, 7 All. 359, and Straight and Mahmud, JJ., in I. L. R., 10 All., 71, held that an application *withdrawn* (with or without the permission of the Court) should be treated *as not made at all;* and that such an application could not give the decree-holder any *fresh* start. But where the decree-holder, not being prepared to proceed with the execution, requested the Court to dispose of his application, as he proposed to make a fresh one, and the Court struck off the application, it was held that there was *no withdrawal* of the application, and that such application gave a fresh start. (*Shanker* v. *Narsingh*, I. L. R., 11 Bomb., 467.) The rulings of the Allahabad High Court in the cases of Sarju Prasad and Radha Churun have been overruled by the Privy Council. (*Thakur Prossad* v. *Fakir-ullah*, I. L. R., 17 All., 106, P. C.) The Calcutta High Court also disapproved

Partition.

Settlement.

Stamp defect.

Registration defect.

Other defect.

Application returned.

Withdrawal or abandonment or application.

P. C. case.

the Allahabad rulings. (See *Wajihan* v. *Bishwanath*, I. L. R., 18 Calc., 462; *Radha Kishen* v. *Radha Pershad*, I. L. R., 18 Calc., 515; *Bunko Behari* v. *Nilmadhub*, I. L. R., 18 Calc., 635.) Sec. 4, Act VI. of 1892, now expressly enacts that *execution* proceedings are proceedings in *suit*, and that sec. 647 does not apply to applications for execution of decrees. And a Full Bench at Allahabad have recently held that Chapters VII and XIII of the Code of Civil Procedure cannot, in view of sec. 4 of Act VI. of 1892, be applied to proceedings in execution of decrees. (*Dhonkal* v. *Phakkar*, I. L. R., 15 All, 84, F. B.) See pp. 893-895 *supra*. The withdrawal of an application without obtaining the permission of the Court to apply again does not therefore prevent the applicant from making a fresh application. Under the law, as it was understood at Allahabad, before Act VI. of 1892 was passed, the decree-holder could not have made any subsequent execution-application, if he had not, on withdrawing the pending proceeding, obtained permission from the Court to apply again. An application for such *permission* made before Act VI. of 1892 must therefore be treated as an application to take a step which was necessary in the N.-W. Provinces, to the taking of further proceedings in execution, and as giving the decree-holder there a fresh start under cl. 4 of art. 179. (*Ram Narain* v. *Bakhtu*, I. L. R., 16 All., 75.) It can now be hardly denied that an application for execution withdrawn (with or without the leave of the Court) will give the decree-holder a fresh start under cl. 4. The application to execute has its effect for the purpose of limitation as soon as it is admitted, and whether it is subsequently withdrawn or allowed to remain dormant is immaterial. Besides, the withdrawal of the application is an indulgence to the judgment-debtor. (See *Ishan* v. *Prannath*, 22 W. R., 512 F. B.; and *Tarachand* v. *Kashinath*, I. L. R., 10 Bomb., 62 at pp. 64, 65.) See also I. L. R., 6 Mad., 250; 16 Mad., 142; and 17 Mad., 76 referred to at p. 909 *supra*.

Act VI. of 1892.

Application for permission to withdraw.

An application by the *real* transferee of a decree (to the Court which passed the decree) to execute the decree is a valid application under sec. 232 of the Code, and it has been held in some cases that an application by the *benamidar* is *not* an application made "in accordance with law." An application by the *real* transferee, though his application is rejected and his name is not substituted on the record, gives him a new start, but an application by the *benamidar*, it has been held in *some* cases, does not. (*Abdul* v. *Chukhun*, 5 C. L. R., 253; *Denonath* v. *Lalit*, I. L. R., 9 Calc., 633; *Gour Sundar* v. *Hem Chander*, I. L. R., 16 Calc., 355, dissenting from *Purna* v. *Abhoya*, 4 B. L. R., Ap. 40, and *Nadir* v. *Pearoo*, 14 B. L. R., 425.) Most of these cases were considered by Macpherson and Banerjee, JJ., in *Balkishen* v. *Bedmati*, I. L. R., 20 Calc., 388, and the learned Judges have, following the two cases in the Bengal Law Reports, held that, where a decree is transferred (really or nominally) by an assignment in writing, and the assignee makes an application for execution under sec. 232, and such application is *granted* by the Court (after giving the judgment-debtor an opportunity of being heard against it), the application, as between the judgment-debtor and the assignee, is in accordance with law, although the assignment is merely ostensible and the applicant is a mere benamidar. Such an application will, it has been held, in the same case, keep the execution-proceeding alive. An application for execution by the legal representative of a deceased decree-holder is a valid application. An order for substitution of names on the record is not a condition precedent to the attaching of the representative's right to apply for execution. (*Narayana* v. *Karuppa*, 5 Ind. Jur.

Application by *benamidar*.

Legal representative.

411 ; Rivaz, 4th ed., 281 ; *Hafizooddin* v. *Abdul*, I. L. R., 20 Calc., 755 ; *Gobind* v. *Appaya*, I. L. R., 5 Bomb., 246.) Except under sec. 232 of the Code or under some other express provision of the law, an application for execution must be made by the decree-holder then on the record. (See *Duriao* v. *Doolla*, 24 W. R., 10.) In one case it was held that an application to get back the copy of the decree for purposes of execution made by the widow of the decree-holder when she had *not* been *substituted* in the place of the decree-holder on the *record*, could not be considered as a *step in aid* of the execution of the decree. (*Gunga Pershad* v. *Debi*, I. L. R., 11 Calc., 227.) It may be observed with reference to this case that the widow did not apply for substitution of names until some time *after* her application for the copy. If the two applications were simultaneous, the result might have been different. And, it has since been held that, when a decree is transferred by operation of law, the transferee (such as the *heir* of the deceased decree-holder) may apply for execution without having applied for substitution of his name on the record. Such an application (though rejected by the Court) is one made in accordance with law within the meaning of cl. 4, art. 179. (*Hafizuddin* v. *Abdool*, I. L. R., 20 Calc., 755.) Where, owing to an error in procedure, a decree was passed in favour of a firm in the name of an agent of the firm, and applications for execution were made by a person who succeeded such agent as the agent of the firm, it was held that these applications, however *irregular*, were *not invalid*. A member of the firm applying to execute the decree was allowed the benefit of those applications. (*Lachman* v. *Patni*, I. L. R., 1 All., 510.)

Agent of a firm.

An application for execution made *after* the time prescribed for it, is not an application made "in accordance with law." (*Nilmoney* v. *Ramjeebun*, 8 C. L. R., 315.) But if such application is granted by the Court, and such order is not set aside on appeal, the judgment-debtor will, in future, be estopped from questioning the validity of the application. (See *Mungul Pershad* v. *Grijakant*, I. L. R., 8 Calc., 51.) If an application for execution is *refused* on the ground that it is barred, and the order is not set aside on appeal, the decree-holder can *not* make a *fresh* application. (*Bandey* v. *Romesh*, I. L. R., 9 Calc., 65.)

Application after time.

An application by a pleader for execution of a decree two days after the decree-holder's death, is not a valid application, as the pleader's authority ceased on the death of his client. (*Kallu* v. *Muhammad*, I. L. R., 7 All., 564.) Cf. sec. 208, Act IX. of 1872, and *Amirunnissa* v. *Ahsanullah*, 13 C. L. R., 18. It has been held by the Punjab Chief Court that an application for execution made under a defective power of attorney, if allowed *without objection*, cannot be objected to in a *subsequent* proceeding on the ground that it was not in accordance with law. (*Lakmi Das* v. *Gobind Ram*, Panj. Rec. No. 105 of 1882 ; Rivaz, 4th ed., 281.)

Application under a defective power.

An application to a Court for the execution of a decree against a Dekhan agriculturist, unless accompanied by a certificate of a conciliator under Act XVII. of 1879, is *not* in accordance with law. (*Monohar* v. *Gebiapa*, I. L. R., 6 Bomb., C. 31.)

Dekhan.

As to *informal* applications subsequently *amended*, see pp. 892, 908 *supra* and I. L. R., 10 Calc., 541. As to defective applications returned for amendment, but *not* amended, see I. L. R., 6 Mad., 250, and pp. 909, 911 *supra*.

Amendment of application.

The application (whether *for execution*, or to take some *step in aid of execution*) must also be made to the *proper Court*, that is, it must be made to the Court whose business it is, either by transfer or otherwise, to execute the decree. (See Expl. II and *Prokash* v.

Applying to the *proper* Court.

Proper Court.

Poorno, 21 W. R., 410.) Under sec. 232 of the Code, an application for execution by a *transferee* of the decree, if made to a Court to which the decree has been *transmitted* for execution, is not an application to the proper Court. (*Kadir Baksh* v. *Ilahi Baksh*, I. L. R., 2 All., 283; *Sheonarain* v. *Hurbuns*, 14 W. R., 65.) But an application to the proper Court (*viz.*, the Court which *passed* the decree) by the transferee of a decree to have his name substituted and for execution, though such application is struck off for the present, is a step in aid of execution. (*Abdul* v. *Muhammad*, I. L. R., 13 All., 89.) An application for execution to the Judge's Court, in respect of a decree passed by the Court of the Munsiff or Subordinate Judge, is not an application to the *proper* Court, unless the decree has been transferred to the former Court. (See *Kristo Cooman* v. *Mahabet*, I. L. R., 5 Calc., 595.) A *suit* to establish the decree-holder's right to execute his decree against property which has been released from attachment under the claim sections of the Code, is not an *application*, nor a step in the *proper* Court within the meaning of art. 179. (See *Raghunundun* v. *Bhingoo*, I. L. R., 17 Calc., 268, 271.) An application to the *Magistrate* for coercing the judgment-debtor is not an application to the proper Court (*Sadagopa* v. *Krishna*, I. L. R., 12 Mad., 356 at p. 364.) A conciliator under the Dekhan Agriculturists' Relief Act is not a *Court*.

Application to *other* Courts.

(*Manoher* v. *Gebiapa*, I. L. R., 6 Bomb., 31.) Even a *bonâ-fide* application made to a *Court without* jurisdiction is not an application to a *proper* Court, but the time during which such application was pending, before it was finally rejected, may be excluded in the computation of the period of limitation. (See sec. 14, cl. 3.) Under Act XIV. of 1859, a *bonâ-fide* application even to a *wrong* Court was sufficient to keep alive a decree. (I. L. R., 2 All., 792, P. C.)

Bonâ fides.

Under Act XIV. of 1859, the period of limitation was counted from the date of the termination of a *bonâ-fide* (not merely colorable) proceeding preceding the application for execution. (See *Eshan Chunder* v. *Prannath*, 22 W. R., 512 at p. 513 F. B.) All questions as to whether the decree-holder had, or had not, made *bonâ-fide* attempts to execute his decree were excluded by Act IX. of 1871. (*Ibid*.) These questions are also excluded by Act XV. of 1877. Sec. 230 of Act X. of 1877, however, as first enacted, made it incumbent on the Court to refuse any subsequent application to execute the same decree unless it was satisfied that on the last preceding application, *due diligence* had been used to procure complete satisfaction of the decree. This provision as to due diligence has been repealed by Act XII. of 1879, and under the present law, neither *bonâ-fides* nor *due diligence* on the part of the decree-holder is required to keep the decree alive. All that he is required to do is to apply in accordance with law to the proper Court, to execute the decree or to take some step in aid of the execution. (See *Halima* v. *Nishan*, 10 Weekly Notes, 77; *Debi* v. *Umrao*, 11 Weekly Notes, 148; Rivaz, 4th ed. 285.) See also pp. 884, 905 *supra*. "Taking a *proceeding* to *keep* the decree *in force*" in sec. 20, Act XIV. of 1859, and "*applying* to *keep* the decree *in force*" in cl. 4, art. 167, Act IX. of 1871, partially corresponded to "*applying* in accordance with law to the proper Court *to take some step in aid of execution* of the decree," in cl. 4, art. 179, Act XV. of 1877. (See *Jumnadas* v. *Lalitram*, I. L. R., 2 Bomb., 294.) An application *simply* to keep the decree in force is not sufficient under Act XV. of 1877—see pp. 905, 906 *supra*.

Due diligence.

Applying to take *step* in aid of execution.

When the Court has been set in motion to execute a decree by an application made under sec. 230 and according to sec. 235 of the Code, any further application during the continuance of the same

proceeding is an application to take some step in aid of execution. (*Chowdhoory Paroos* v. *Kali Puddo*, I. L. R., 17 Calc., 53; *Dalichand* v *Bai*, I. L. R., 15 Bomb., 242 at p. 244.) Such further application (after the initiation of the execution-proceeding) must be an application to *the Court* whose duty it is to execute the decree. (See Explanation II.) It must also be an application in accordance with law, that is, it must ask the Court to do something which that Court is empowered or required to do by law for the purpose of aiding to execute the decree. (*Aghore* v. *Prosunno*, I. L. R., 22 Calc., 827.) Step in aid of execution.

Even an *oral* application by the decree-holder or his vakil to take some step in aid of execution is an application within the meaning of cl. 4. See *Amar* v. *Tika*, I. L. R., 3 All., 139; *Ali* v. *Gur Prasad*, I. L. R., 5 All., 344; *Dharanumma* v. *Subba*, I. L. R., 7 Mad., 306; *Maniklal* v. *Nasia*, I. L. R., 15 Bom., 405. An application or request *inferred* from the *sheristadar's* report and the Judge's subsequent order thereon may be sufficient. (*Kooronayya* v. *Krishnamma*, I. L. R., 17 Mad., 165, 166.) But compare I. L. R., 9 Calc., 730 and I. L. R., 12 Calc., 441. Oral application.

An application for the *transfer* of a decree, to the Court which passed the decree, under the provisions of sec. 223 of the Code, is an application for a step in aid of execution. (*Latchman* v. *Maddan*, I. L. R., 6 Calc., 513; *Collins* v. *Maula Baksh*, I. L. R., 2 All., 284.) Though such an application is not an application for *execution* within the terms of sec. 230 (*Nilmoney* v. *Biressur*, I. L. R., 16 Calc., 744), it is undoubtedly an application to take a step in *aid* of execution. (*Rajbullubh* v. *Joykishen*, I. L. R., 20 Calc., 29; *Chundra* v. *Gurroo*, I. L. R., 22 Calc., 375.) An application to the Court executing the decree, to *re-transfer* a decree to the Court which originally passed it, is also an application for a step in aid of execution. (*Krishnayyar* v. *Venkayyar*, I. L. R., 6 Mad., 81.) The decree-holder may, under sec. 223 of the Civil Procedure Code, apply to the executing Court to return the decree to the original *Court*, if it has not been completely executed, and to send it a certificate of what has been done, *i.e.*, a certificate of how far, if at all, the decree has been executed. Such application is an application to the proper Court to take a step, which it is necessary to take under sec. 223 before the further execution of the decree can proceed. But an application to the executing Court to give the decree-holder *himself* the partially executed decree (although it is made with the object of getting the decree further executed) is not a step in aid of execution, as it is not one of the things which that Court is *empowered or required to do by law* for the purpose of executing or assisting to execute the decree. (*Aghore* v. *Prosunno*, I. L. R., 22 Calc., 827.) An application to the Court to do something which the Court is legally *incompetent* to do is not an application in accordance with law. (*Chattar* v. *Newal*, I. L. R., 12 All., 64.) See p. 908 *supra*. An application to take some step in aid of execution is *not* necessarily an application for a warrant of attachment or arrest. It includes an application which is in the nature of a mere *preparation to apply for* attachment of the debtor's property. An application to get something without which an application to attach the debtor's land cannot be made (*e.g.*, for a certificate that a copy of the revenue-register is necessary to enable him to obtain such a copy from the Collector's office) is a step in aid of execution, provided the application is made to the Court executing the decree. (*Kunhi* v. *Seshagiri*, I. L. R., 5 Mad., 141.) An application for the amendment of a decree under sec. 206 of the Code is not a step in aid of execution. Even where such application can be made to the *proper* Application for transfer of decree. For re-transfer. Preparation to apply for attachment. Application for amendment of decree.

Court within the meaning of art. 179, if no application for *execution* of the decree is made, no foundation is laid for an application to take some step in *furtherance* of such execution. (*Kallu* v. *Fahiman*, I. L. R., 13 All., 124.) But if the decree, as originally framed, is absolutely incapable of execution, the decree-holder may, under art. 178, count his three years from the date when the decree is made capable of execution by amendment. (*Muhammad* v. *Muhammad*, I. L. R., 17 All., 39.)

For return of copy of decree.

An application by the decree-holder or his legal representative for the return of a *copy of the decree* for purposes of execution is not a step in aid of execution. (*Gunga* v. *Debi*, I. L. R., 11 Calc., 227; *Rajkumar* v. *Rajlakhi*, I. L. R., 12 Calc., 441, 445.) A step which is *necessary* to be taken before execution can be had, is "a step in aid of execution." Applying for a copy of the decree with intent to apply for execution is not such a step. (*Govilandhu* v. *Domburu*, I. L. R., 11 Mad., 336.) No copy of the decree is required by law to be filed in execution. (*Rajkumar* v. *Raj Lakhee*, I. L. R., 12 Calc., 441, 445.)

Certificate of heirship.

An application for a certificate of heirship, or an application for probate or letters of administration not being an application to the *Court executing* the decree, cannot keep alive the decree, or give a new start. (See 4 Mad., 89, 148.) Although, since the Succession Certificate Act, VII. of 1889, came into operation, no Court can *proceed* upon an application made by a *representative* of a deceased decree-holder, except on his producing a probate, letters of administration, or a succession certificate, yet if such application is made in accordance with sec. 232 of the Procedure Code, it will give a fresh starting point from which the period of limitation may be counted. The dismissal of such an application on the ground that no certificate has been produced by the representative does not prevent such application from being treated as an application to take some step in aid of execution. (*Hafizooddin* v. *Abdul*, I. L. R., 20 Calc., 755. See also *Brojo* v. *Isswar*, I. L. R., 19 Calc., 482; *Mangal* v. *Salim*, I. L. R., 16 All., 26.)

Substitution of legal representatives.

When during the pendency of an application for execution the decree-holder dies, and his son applies to the proper Court to have his name substituted on the record, and prays that money should be levied under the decree and paid to him, his application is an application to *enforce* the decree, and therefore a step in aid of execution. (*Govind* v. *Appaya*, I. L. R., 5 Bomb., 246.) An application by the heir or the assignee of a decree-holder to execute the decree is a good application, although his name has not yet been substituted for that of the original decree-holder. (*Hafizooddin* v. *Abdul*, I. L. R., 20 Calc., 755 at p. 757.) The case of *Gunga Pershad* v. *Debsundari*, I. L. R., 11 Calc., 227, may possibly be construed as laying down a different rule, but that case was not so construed by the learned Judges in Hafizooddin's case. An application made by the assignee of even a *part* of the decree for execution of the *whole* decree keeps alive the whole decree. (*Ramasami* v. *Anda*, 1 Mad. L. J., 240.) See p. 912.

Proper Court.

An application to execute the decree *against* the legal representatives of a deceased *judgment-debtor* under sec. 234 of the Code must be made to the Court in which the suit was *first* heard and determined, although by sec. 248 the notice to such legal representative would be issued by the Court to which the decree had been transmitted for execution before the death of the judgment-debtor. (*Hirachand* v. *Kastur*, I. L. R., 18 Bomb., 224) See p. 914 *supra*.

Attachment.

An application for attachment or arrest is an application to enforce the decree and a step in aid of execution. (See *Jamnadas* v. *Lalit Ram*, I. L. R., 2 Bomb., 294; *Lachman* v. *Thondi*, I. L. R.,

7 All., 382.) An application to attach property, when not *itself* the application for *execution* of the decree, is an application to take a step in *aid* of execution. (*Lakmi* v. *Gobind*, Punj. Rec. No. 105 of 1882; Rivaz, 4th ed., p. 273.) An application to *continue* the attachment of property is ordinarily not a step aiding or advancing the execution. (*Abdul* v. *Fazilun*, I. L. R., 20 Calc., 255.) Though an attachment in execution operates *de die in diem*, as a process of execution upon a decree (*Brooks* v. *Pattammari*, 4 Mad., 316), yet it is from *the date of applying* to take some step in aid of execution that limitation commences to run under art. 179, cl. 4. Attachment.

An application by the decree-holder, under sec. 273 of the Code, to execute on his behalf an attached money-decree of the *same Court*, is an application to take some step in aid of execution of the original decree. (*Lachman* v. *Thondi*, I. L. R., 7 All., 382.) The person attaching the decree is entitled to have execution of the attached decree enforced on his application as if he were a representative of the holder of the attached decree. (*Peary* v. *Romesh*, I. L. R., 15 Calc., 371; *Lakhmi* v. *Ballam*, I. L. R., 17 All., 425 at p. 426.) Application to execute attached money decree.

It was held in one reported case that the deposit of *nilamee* fees, that is, costs of bringing certain property to sale in execution, was a step in aid of execution, and that it gave a new start under cl. 4. (*Radha Prosad* v. *Sunder Lall*, I. L. R., 9 Calc., 644.) But in later cases it has been ruled that the *mere* payment of a Court fee or postage stamps into Court in connection with proceedings already commenced, cannot be treated as an *application* to take some *step in aid of execution*, if it appears that the decree-holder did *not* on that occasion *ask the Court* to take any step in aid of the execution. (*Toree Mahomed* v. *Mahomed*, I. L. R., 9 Calc., 730; *Vellaya* v. *Jaganatha*, I. L. R., 7 Mad., 307.) Cl. 4 of art. 179 evidently means that there must be some *application* to the Court to take some step. And where a step has been taken, or an order has been passed without any application at all, it does not seem to fall within the purview of the law. (*Per* O'Kinealy, J., I. L. R., 12 Calc, 441 at p. 445.) See also *Bansi* v. *Sikree*, I. L. R., 13 All., 211, where it was held that if the decree-holder makes an *application* for leave to bid, such *application* is a step in aid of execution. An order confirming an execution sale, passed *without* any application on the part of the decree-holder, is *not* sufficient. (I. L. R., 12 Calc., 441.) Where the decree-holder himself is the purchaser, an application for confirmation made by the purchaser as purchaser, not being an application by the *decree-holder as such*, is not an application to take some step in aid of execution. (Misc., First App. No. 21 of 1892 decided by Amir Ali and Gordon, J.J., on 7th April 1893.) Confirmation of sale by the Court of its *own* motion is not sufficient. (*Motendro* v. *Mohendro*, 10 C. L. R., 330.) An application, though made *after* an order for transmission of a decree to another Court, bringing in postage stamps and *asking* that the decree might thereupon be transmitted, is sufficient to give a new start. (*Vellaya* v. *Jaganatha*, I. L. R., 7 Mad., 307.) An application for the issue of a fresh proclamation of sale, or for the fixing of a fresh date for the sale which had been previously adjourned, is an application to enforce the decree, and therefore a step in aid of execution. (See *Amar Sing* v. *Tika*, I. L. R., 3 All., 139; *Ambica* v. *Surdhari*, I. L. R., 10 Calc., 851 F. B.; *Chowdhry Paroos* v. *Kalipuddo*, I. L. R., 17 Calc., 53.) It can *not* be said that an application to issue a proclamation is *unnecessary* by law, and that it is no application at all. Notwithstanding that the attachment of the debtor's property has issued, the proceedings from time to time for the purpose of enforcing the sale must always be, and as a matter of practice always are, initiated by the decree-holder. Deposit-ing fee or stamps. Act or order *without* applica-tion. Fresh proclama-tion or date of sale.

(I. L. R., 10 Calc., 851 F. B.) An application to fix a fresh date for execution sale is an application to take a step in aid of execution, although such application is made orally. (*Amar* v. *Tika*, I. L. R., 3 All., 139.)

Selling whole in one lot.

It has been held in another case that an application put in by the decree-holder to sell the whole of the attached properties in one lot is *not* an application for a step in aid of execution within art. 179. (*Khairunnissa* v. *Gauri*, I. L. R., 3 All., 484.) But compare *Dharanamma* v. *Subba*, I. L. R., 7 Mad., 306, where it was held that the decree-holder's consenting to a postponement of the sale of certain attached property, on the condition that some other property were sold forthwith, was a step in aid of execution.

Restoring application. Recording payment.

An application by a judgment-creditor that his execution case, which had been struck off, should be *restored*, and his certificate of a payment made by the judgment-debtor, out of Court, should be *recorded* under sec. 258 of the Code, is an application to take some step in aid of execution. (*Tarini* v. *Bishtoo*, I. L. R., 12 Calc., 608; *Muhammad* v. *Ram*, I. L. R., 9 All., 9.) See also *Sujan* v. *Hira*, I. L. R., 12 All., 399 F. B., and *Wasi* v. *Poonit*, I. L. R., 20 Calc., 696.

Striking off.

An application by the *judgment-debtor* (with the *consent* of the *decree-holder*) to have the execution-case *struck off* on the ground that he has paid a part of the decretal amount, and that he would pay the balance hereafter, it has been held, keeps the decree alive. (*Ghansham* v. *Mukha*, I. L. R., 3 All., 320.) Dr. Stokes doubts if such an application could be a step *in aid* of execution. (Anglo-Indian Codes, Vol. II, pp. 951, 1002.) See also *Sujan* v. *Hira*, I. L. R., 12 All., 399 at pp. 404, 405, and *Abdul* v. *Fazilun*, I. L. R., 20 Calc., 255 at p. 258. As to the effect of striking off an application, see p. 895 *supra*.

Summoning witnesses and merely *appearing* to oppos

An application by the decree-holder to summon witnesses in a proceeding originating in a claimant's application objecting to the attachment of property in execution, has been held to be a step in aid of execution. (*Ali* v. *Gur Prasad*, I. L. R., 5 All., 344.) But the mere *appearance* of a pleader for the decree-holder to oppose the judgment-debtor's application to set aside an execution sale is not an *application* to take some step in aid of execution which must be an application to obtain some *order* of the Court in *furtherance* of the execution. (*Umesh* v. *Soonder*, I. L. R., 16 Calc., 747.) It has very recently been held by Prinsep and Ghose, J.J., that where a decree-holder opposing an application to set aside a sale held at his instance, puts in a list of witnesses and asks the Court to summon and examine the witnesses, he takes a step in aid of execution, and is entitled to have a fresh period of three years for another application for the execution of his decree. (Misc. App. No. 373 of 1894, decided on the 7th August 1895.)

Asking for confirmation of sale.

An application by a decree-holder praying that the objection taken by the debtor to the sale of property should be disallowed and the sale confirmed, is also a step in aid of execution. (*Kewal* v. *Khadim*, I. L. R., 5 All., 576; *Gobind* v. *Runglal*, I. L. R., 21 Calc. 23.) Confirmation of sale by the Court of its *own* motion is not such a step. (*Motendro* v. *Mohendro*, 10 C. L. R., 330.)

Asking for qualified sale.

An application by the decree-holder to allow the attached property to be sold subject to a third party's mortgage who has put in a claim, is an application to take some step in aid of execution. (*Lalraddi* v. *Kalachand*, I. L. R., 15 Calc., 363.)

Insisting on sale of property.

Where the vakil of the decree-holder partially consents to the debtor's application to postpone the sale of the properties attached, but *insists* that *some* of the properties should be sold at once, and he

asks for an order that a lot reserved should subsequently be sold in its entirety, the act of the vakil is an application to take a step in aid of execution. (*Dharanamma* v. *Subba*, I. L. R., 7 Mad., 306. But cf. I. L. R., 3 All., 484.)

Continuing attachment.

It has been said that an application by the decree-holder to stay the sale, but to *continue* the attachment, is one to keep in force the decree and, *perhaps*, a step in aid of execution. (See *Nukanna* v. *Ramasami*, I. L. R., 2 Mad., 218; *Jamnadas* v. *Lalitram*, I. L. R., 2 Bomb., 294.) But it has been held that such an application has the effect temporarily, at all events, of *retarding* the execution, and that the mere *continuance* of the attachment has *ordinarily* the effect of leaving things precisely as they were, and *not aiding or advancing* the execution in any respect. (*Abdul* v. *Fazilun*, I. L. R., 20 Calc., 255.)

Postponing sale.

An application by a *decree-holder* for the postponement of a sale, on the ground that he has allowed the judgment-debtor time, is not a step in *aid* of execution. (*Mainath* v. *Debi Baksh*, I. L. R., 3 All., 757. See also *Fakir* v. *Ghulam*, I. L. R., 1 All., 580.) Compare *Sitaldin* v. *Sheo Prasad*, I. L. R., 4 All., 60; *Rajlukhee* v. *Rashmunjory*, 5 C. L. R., 515, in which *both* the parties expressly agreed to the postponement. Dr. Stokes doubts the correctness of the ruling in these cases. (Vol. 2, pp. 951, 1002.) Where *both* the parties give their consent, and the decree-holder's pleader present the application, it may be treated as practically an application by the decree-holder. (*Sujan* v. *Hira*, I. L. R., 12 All., p. 404.) But to postpone an execution sale is temporarily to *retard* the execution (I. L. R., 20 Calc., 225.)

Obtaining time from decree-holder.

Obtaining time by writing a letter to the opposite party's solicitor who agrees to give the time is not taking a step in the proceeding in Court. (Per North, J., in *Brighton* v. *Woodhouse*, 1893, 2 Ch., 486. See also *Ives* v. *Williams*, 1894, 2 Ch. 478.)

(Acknowledgment.)

A written application by the *judgment-debtor* praying for additional time for *payment* of the amount of the decree, though not a step in aid of execution, is an acknowledgment within the meaning of sec. 19. (*Toree* v. *Mahomed*, I. L. R., 9 Calc., 730.) See also *Muhammed* v. *Payag*, I. L. R., 16 All., 228.

Taking out money deposited in Court.

It has been held in Calcutta that an application by a decree-holder to be paid the proceeds of a sale in execution, is *not* an application to take a *step in aid of execution*. (*Hem Chunder* v. *Brojo Soondari*, I. L. R., 8 Calc., 89; *Fazal Imam* v. *Metta Sing*, I. L. R., 10 Calc., 549; *Wodoy* v. *Abdool*, 24 W. R., 339; *Gunga Pershad* v. *Dabi Sundari*, I. L. R., 11 Calc., 227.) But the Madras and the Allahabad High Courts are of a different opinion. (See *Venkatarayalu* v *Narasimha*, I. L. R., 2 Mad., 174; *Paran Sing* v. *Jawahir*, I. L. R., (All., 366; *Sujan* v. *Hira*, I. L. R., 12 All., 399 at p. 406.) Following these cases it has been held by Ayyar and Best, JJ., that an application for payment of money realised by attachment (though such application is dismissed for non-payment of process charges) is a step in aid of execution. (*Kerala* v. *Shangaram*, I. L. R., 16 Mad., 452.) It may be observed, however, that money deposited in Court in satisfaction of a decree may be taken out by the decree-holder years after the deposit. The amount must be taken to be transferred to the credit of the decree-holder and may be taken out even after more than three years from the date of any proceeding in execution. (*Hemchunder* v. *Brojo Soondury*, I. L. R., 8 Calc., 89 at p. 91; *Sheo Gholam* v. *Rahut*, I. L. R., 4 Calc. 6.) With reference to this observation, Ayyar and Best, JJ., remark that in deciding whether a particular application is or is not an application to take some step in aid of execution, it is the *nature* of the act applied for that must be looked to, and not the *time* at which it

Taking out money deposited in Court.

may *possibly* be done. (*Koormayya* v. *Krishnamma*, I. L. R., 17 Mad., 165.) An application to take out monies deposited by the judgment-debtor in Court, or realised by the sale of his property, is an application which is intended not only to aid execution, but to acquire the fruits of execution, namely, the recovery of fruits which in execution of decree became the property of the decree-holder. (Per Mahomed, J., in *Sujan* v. *Hira*, I. L. R., 12 All., 399 at p. 406 F. B.) The Calcutta High Court has, in some cases, construed the words of clause 4 *less liberally* than some of the other High Courts. In the Punjab, the rule followed is similar to that laid down in I. L. R., 8 Calc., 89. (See *Mulchand* v. *Koursingh*, Punjab Rec. No. 27 of 1888, Rivaz, 4th Ed., p. 276.)

Asking to record private payment.

An application made by the decree-holder under sec. 258 of the Civil Procedure Code to enter up part satisfaction of the decree, provided the payment asserted in the application has been *actually* made, is an application to take a step in aid of execution. (*Sujan* v. *Hira*, I. L. R., 12 All., 399, F. B.) See also *Wasi* v. *Poonit*, I. L. R., 20 Calc., 696; I. L. R., 12 Calc., 608; I. L. R., 9 All., 9. But an *untrue* application as to a payment out of Court is *not* an application to take a step in aid of execution. (*Kanhia* v. *Ruder*, 8 Weekly Notes, 23; Rivaz, 4th Ed., 276.)

Asking leave to bid.

The mere *payment* of a Court fee by the decree-holder, in connection with execution proceedings with a view to obtain leave to bid for some property then up for sale, is *not* an application asking the Court to take any step in aid of the execution. Such payment would not give a fresh starting point. (*Toree* v. *Mahomed*, I. L. R., 9 Calc., 730.) But it has been held at Allahabad that an *application* by the decree-holder for leave to bid at the sale in execution of his own decree, is an application to take a step in aid of execution. (*Bansi* v. *Sikree*, I. L. R., 13 All., 211.)

Resisting is *not* applying.

Resistance to execution of a decree held by the debtor can *not* be a step in execution of the creditor's own decree. (*Shiblol* v. *Radhakissen*, I. L. R., 7 All., 898.) Resistance to an appeal preferred by the judgment-debtor against an order made in execution of a decree is not an *application* to the proper Court to take some step in aid of execution. (*Kristocoomar* v. *Mahabat*, I. L. R., 5 Calc., 595.) Resistance to an application by the judgment-debtor to set aside an execution sale, not being an application for an order in furtherance of the execution, is not a step in aid of execution. (*Umesh* v. *Soonder*, I. L. R., 16 Calc., 747.) See pp. 906, 916 *supra*.

Issue of *process*.

The *issue* of a writ of attachment or a warrant of arrest does not give a new start, but an *application* for such a writ or warrant (being an application to take a step in aid of execution) does.

Cl. 5. Issue of notice.

Under the *express* provisions of cl. 5, art. 179, the *issue* of a notice to show cause why the decree should not be executed, under sec. 248 of the Code, gives a new start, although the preceding application for execution is defective or irregular and invalid. (*Beharilall* v. *Salik Ram*, I. L. R., 1 All., 675; *Dhonkal* v. *Phokkar*, I. L. R., 15 All., 84, F. B.) The date of issuing the notice is the date on which the order directing the issue is signed by the Court. (*Udit* v. *Ram*, 1 Weekly Notes, Allahabad, 147; Rivaz, 4th Ed., 289.)

Cl. 6. Execution of decree for *payment* to be made at a *certain future* date.

Where the application is not to enforce any *payment*, but to compel the judgment-debtor to do an *act* which the decree directs to be done at a certain *future* date, cl. 6 or any other clause of art. 179 does not apply. (See p. 897 *supra* and 5 Mad. L. J. 91.) Such applications will be governed by art. 178. See *Muhammad* v. *Muhammad*, I. L. R., 16 All., 237, which was a case of a decree directing *delivery of land* on default in making certain annual payments in the *future*.

Where a decree directs a plaintiff to do a certain act on a certain future date, and on his doing so it directs that the defendant should do a certain other act, the plaintiff may, it has been held, offer to do the act directed and execute his decree against the defendant within three years of that date. Allowing the time fixed by the decree to pass by does not disentitle the plaintiff to execute *his decree*. (*Narayan* v. *Vithul*, I. L. R., 12 Bom., 23.) Term, *not* a condition precedent.

An ordinary *instalment* decree, as well as a decree the payment of the whole amount of which is postponed to *one* certain date, come under cl. 6. (See *Sukharam* v. *Gonesh*, I. L. R., 3 Bomb., 193; *Tata* v. *Konodata*, I. L. R., 7 Mad., 152.) In *Lakshmibai* v. *Madhavrav* (I. L. R., 12 Bomb., 65), it has been held that where a decree, *not* being merely a *declaratory* one, positively creates an *annually recurring right* to a certain sum as maintenance, though no precise dates are specified in the decree for the payments, the decree as to each year's maintenance is to be regarded as *speaking on the day* upon which for that year it becomes operative, and separately for each year. The judgment-debtor is liable to pay the sum on the day year from the date of the decree, and thence forward on the corresponding date, year after year. But it was held by the Madras High Court that unless an actual date had been *specified* in the decree either absolutely or in relation to some contingency, for monthly or annual payments, the decree (*even* as regards the *later* instalments) must be executed within three years of the date of the decree. (*Yusuf Khan* v. *Sirdar Khan*, I. L. R., 7 Mad., 83.) This case did not notice the fact that Act XII. of 1879 has *substituted* the words "certain date" for the words "*specified* date," in cl. 6, art. 179 of Act XV. It has now been held by the Madras High Court that, although a decree may not in express terms fix a specified date, yet if it can be gathered from the decree as a whole that payment is directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of clause 6 are satisfied. (*Kavere* v. *Venkamma*, I. L. R., 14 Mad., 396.) A decree directing the payment of maintenance in future is analogous to a decree for money payable by instalments. (*Ashutosh* v. *Lukhimoni*, I. L. R., 19 Calc., 139, at p. 144, F. B.) But it may be otherwise if there is no order directing the allowance to be paid in any given month or upon any given day. (*Ram Dial* v. *Indar*, I. L. R., 16 All., 179.) It has been held that a foreclosure decree which provides that the decree-holder *may not apply for its execution* till after the expiry of a certain period from its date, may under art. 178 be executed within three years of the *expiry* of the period. (*Thakurdas* v. *Shadi*, I. L. R., 8 All., 56.) But according to the Punjab Chief Court, when a decree is passed which by its terms is not to be executed till a future date, limitation must still be taken to run from the date of the decree (under cl. 1, art. 179) and not from the date when it becomes enforceable. (*Robson* v. *Mahomed*, Punj. Rec. No. 43 of 1878; *Jalla* v. *Doola*, Punj. R. No. 126 of 1892; Rivaz, 4th Ed., pp. 294, 295.) Art. 179, cl. 6, applies only when the decree *directs* a *payment* to be made at a *certain* date, and the other clauses presuppose a decree which may be executed *at once*. Where a decree based on a compromise directed that payment should be made "within eight years," it was held that cl. 6 of this article could not be made to apply. (*Lalta Prasad* v. *Sheo Sahae*, 5 Weekly Notes, 193; Rivaz, 350.) Here the date of payment was not only *not specified* but left *uncertain*. It may be contended, however, that the money directed to be paid was payable at the *end* of the 8th year from the date of the decree. See *Ball* v. *Stowell*, I. L. R., 2 All., 322, and p. 707 *supra*.

Instalment decree.

Decree for future maintenance.

Specified or certain date.

Where cl. 6 does or does not apply.

Instalment decree with *proviso*. Waiver of default.

In the case of a decree payable by instalments with a *proviso* that, if default be made in payment of one instalment, the *whole* shall become due, limitation runs from the date of the *first* default. So far as the execution of the *whole* decree is concerned, *even* where the decree-holder *waives* the benefit of the proviso, he is not on general principles entitled to count the period of limitation from the date of any *subsequent* default. (See *Dulsook* v. *Chugon*, I. L. R., 2 Bomb., 356; *Shibdat* v. *Kalka Persad*, I. L. R., 2 All., 443; *Asmatullah* v. *Kally*, I. L. R., 7 Calc., 56.) In *Monmohun* v. *Durgachurn*, I. L. R., 15 Calc, 502, it has been held in Calcutta, on the principle of *stare decis*, that it is *only* where the decree-holder *does not waive* the default (by receiving an overdue instalment) that the decree must be executed within three years of the *first* default, and that even the later instalments cannot be recovered after that period; and that, where there *has been* a real *waiver* of a default, the later *instalments* may, of course, be recovered *as such*. See p. 717, *supra*. The rule laid down in I. L. R., 2 Bomb., 356, has been applied to a case where a decree for *possession* of land contained a proviso that, so long as the defendant paid the plaintiff Rs. 180 a year in three instalments, the decree *should not be executed*, but that, if default were made in payment of three such instalments, the plaintiff should be entitled to delivery of the *land*. The provision as to *waiver* of defaults in payments contained in art. 75 was considered to be inapplicable, and the application for execution was held to be barred because more than three years had elapsed from the date of the first default. (*Ugrahnath* v. *Laganmani*, I. L. R., 4 All, 83.) But art. 179, cl. 6, cannot possibly apply to such a case. It has since been held at Allahabad that such a decree for possession should be construed as giving the decree-holder an *option* of waiving a default in payment, and that the decree-holder may execute such a decree within 3 years of the *last* default under art. 178. (*Muhammad* v. *Muhammad*, I. L. R., 16 All., 237; *Thakurdas* v. *Shadi*, I. L R., 8 All., 56.)

Proviso for delivery of *land*.

Certain, and *ascertainable* dates.

If a date which *may be ascertained* is a *certain* date, art. 179, cl. 6, will apply to a decree directing a *payment* to be made on a date which may be so ascertained; if not, art. 178 will apply. According to the Madras High Court, the question whether a sum is payable by an ascertained date is a question purely of construction. If the dates are sufficiently indicated by the decree read as a whole, they are *certain* dates within the meaning of this clause. (*Kaveri* v. *Venkamma*, I. L. R., 14 Mad., 396.)

(Estoppel.)

As to when the holder of an instalment decree with a penal proviso may be estopped from enforcing the *penalty* under the *proviso*, and when he may be estopped from reverting to an enforcement of the *instalments*, as they severally fall due, see *Radha Prasad* v. *Bhagwan*, I. L. R., 5 All., 289.

Latest cases of instalment decrees.

The latest cases on the subject of the execution of instalment decrees with a proviso for the execution of the whole decree in case of a default are *Hurri Pershad* v. *Nasib Singh*, I. L. R., 21 Calc, 542, and *Shankar* v. *Jalpa*, I. L. R., 16 All., 371. See. pp. 715-718, *supra*.

Agreement of parties.

A mere *agreement* of the *parties* by which the decree-holder binds himself to accept payment of his decree by *instalments*, does not bring the case under this clause. Limitation in such a case runs as usual from the date of the decree. (See *Kristo Komul* v. *Huree Sirdar*, 13 W. R., F. B., 44.) An instalment bond executed by the judgment-debtor for the amount of the judgment debt, but not certified to the Court, cannot prevent execution of the decree as it originally stood. (*Ram Dyal* v. *Ram Hari*, I. L. R., 20 Calc., 32.) If an agree-

ment has been sanctioned by the Court, under sec. 257A of the Code, an application to enforce the agreement will be governed by art. 178. (*Sham* v. *Piari*, I. L. R., 5 All., 596.) If by such an agreement the parties intended that a larger amount (of interest) should be realized as in *execution* of decree rather than by recourse to a separate *suit*, such agreement may be enforced in execution; the Court which would try the regular suit being the same Court which would execute the decree. (*Thakoor Dyal* v. *Sarju*, I. L. R., 20 Calc., 22.) A decree which is altered by an order under sec. 210 of the Code must be executed subject to such alteration. (*Tata* v. *Rama*, I. L. R., 7 Mad., 152.) See pp. 870, 883 *supra*. The Court to which a decree has been transferred for execution has no power to sanction an agreement under sec. 257A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by the Court which passed the decree. According to Edge, C.J., an agreement sanctioned under sec. 257A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under sec. 210, though an order under sec. 210 would operate as a sanction under sec. 257A. (*Gandharp* v. *Sheodarshan*, I. L. R., 12 All., 571.)

Sec. 257A.

Subsequent *order* under sec. 210.

As to instalment decrees for amounts not exceeding 500 rupees under Act VIII. of 1869 (Bengal Council) or Act VIII. of 1885, to which cl. 6 does not apply, see *Gureebullah* v. *Mohun Lall*, I. L. R., 7 Calc., 127; *Mamtazul* v. *Nirbhai*, I. L. R., 9 Calc., 711; *Ram Saday* v. *Dwarka*, I. L. R., 22 Calc., 644; and p. 192 *supra*. Clauses 1, 2, and 3 of art. 179 of Sched. II., Act XV. of 1877, are incorporated in art. 6 of Sched. III. of the Bengal Tenancy Act, VIII. of 1885. Clauses 4, 5, and 6 of art. 179 of the former Act are not so incorporated in art. 6 of the latter Act. It has therefore been held that where a rent decree was passed under the Bengal Tenancy Act for the sum of Rs. 400 payable 3 months after the date of the decree, the 3 years are to be counted from the date of the decree and not from the date when the sum became payable. (*Ram Saday* v. *Dwarka*, I. L. R., 22 Calc., 644.) It should be noted that if the sum decreed including the costs of execution *exceed* rupees five hundred, the provisions of art. 179 of the general Limitation Act would apply even to decrees under the Bengal Tenancy Act. (See pp. 192 and 524 *supra*.)

500 Rupees decrees, under Bengal Rent Acts.

Expl. I.—The *first* paragraph of Expl. I deals with decrees passed severally or jointly in *favour* of more persons than one. The *second* paragraph of the explanation treats of decrees passed severally or jointly *against* more persons than one. The first part of each paragraph deals with decrees passed *severally* in favour of or against more persons than one, and the second part of each paragraph refers to decrees passed *jointly* in favour of or against more persons than one.

Expl. I. Joint, or several, decrees in favor of or against more persons than one, p. 886.

This Explanation is in *accordance* with the decided cases on the subject. As to applications for the execution of decrees passed *severally* in *favor* of more persons than one, see *Chooa Sahoo* v. *Tripoora*, 13 W. R., 244. As to applications for the execution of decrees passed *jointly* in *favor* of more persons than one, see *Brijocoomar* v. *Ram*, 1 W. R., Misc. 2; *Johiroonissa* v. *Ameeroonissa*, 6 W. R., Misc., 59; *Maharanee Indurjeet* v *Mazuu*, Ibid, 76; *Shibchunder* v. *Ramchunder*, 16 W. R., 29. As to the effect of an application for *partial* execution by one of the joint decree-holders, see *Ponnampilath* v. *Ponnampilath*, I. L. R., 3 Mad., 79; *Nandurai* v. *Raghunandan*, I. L. R., 7 All., 282; 16 W. R., 29, and p. 910 *supra*. As to applications for the execution of decrees passed *severally against* more persons than one, see *Wise* v. *Rajnarain*, 19 W. R., 30, F. B. As to applications for the execution of decrees passed *jointly against* more persons than

Rulings under the old law.

one, see *Shaikh Buneead* v. *Juggessur*, 6 W. R., Misc., 25, and *Mohesh* v. *Taramonee*, 9 W. R., 240.

One decree assigning a share of a share to be obtained under another decree.

Where a decree is passed in favor of a Hindu father alone, and his son subsequently obtains a decree against him in a partition suit whereby the son's right is established to one-fifth of whatever share be acquired by the father by virtue of the first decree, the son is an assignee by operation of *law* of one-fifth of the judgment debt in the first decree. Expl. I does not apply to a case like this. But the son's application for execution of the whole of the first decree may, it has been held, keep that decree alive. (*Ramasami* v. *Anda*, I. L. R., 14 Mad., 252.) The principle of the rules in secs. 231 and 232 of the Code was considered to be applicable to the son's application, but sec. 231 itself, like Expl. I of art. 179, can hardly apply to such a decree. (See *Ramasami* v. *Anda*, I. L. R., 13 Mad. 347.)

Sureties.

A person who has become liable as surety before the passing of a decree in an original suit may be proceeded against under sec. 253 of the Code. Steps taken to execute the decree against the judgment-debtor, it has been held, may keep alive the decree against the surety in such a case. (*Babu Ramkishen* v. *Hurkhoo*, 7 W. R., 329.) It is otherwise where sec. 253 is inapplicable. (*Hurkhoo* v. *Baboo Ramkishen*, 6 W. R., Misc. 44.) It may be doubted however if decrees against the debtor and his surety are *joint* decrees within the meaning of Expl. I. of art 179, Act XV of 1877.

Deposits as security.

Where money and other property is deposited in Court as *security* for the satisfaction of the decree in the event of the debtor's appeal (against an order overruling his objection to the execution) being dismissed, and such appeal is *dismissed*, it is generally not necessary to take any further proceedings in execution. So far as the money is concerned, it must, on the appeal being dismissed, be taken to have been *transferred to the credit* of the decree-holder, and the Court should similarly deal with the property pledged, converting it into cash for his benefit. No question of limitation under art. 179 arises in such a case. (*Sheo Gholam* v. *Rahut*, I. L. R., 4 Calc., 6.)

Legal representatives of a debtor.

Execution against one of several *legal representatives* of a deceased judgment-debtor is treated as execution against one of several *joint judgment-debtors*. Application against *one* takes effect against *all*. (*Ram Anuj* v. *Hingu Lall*, I. L. R., 3 All., 517; see also *Krisnaji* v. *Murrarrav*, I. L. R., 12 Bomb., 48.) Had it been intended that the legal representatives of a sole judgment-debtor (or of jointly liable judgment-debtors) should have the benefit of the *first* portion of the second paragraph of Explanation I, on the *analogous* ground that they are only liable to the extent of the property in their possession, the Legislature would have extended that provision to them. The position, however, of several representatives of a sole judgment-debtor is very *different, quoad* the decree-holder from that of several judgment-debtors with separate liabilities *found* by the *decree*. (See the judgment of Oldfield, J., in I L. R., 3 All., 519.)

Partition decree—execution.

It has been observed by Ainslie and McDonell, JJ., that a decree for partition is a joint declaration of the rights of persons interested in the property of which partition is sought, and that such a decree, *when properly drawn up*, is in *favour* of *each* shareholder or set of shareholders having a distinct share. It has been held by the learned Judges, that where there are only *two* parties in a suit for partition, there can be no room for ambiguity in the drawing up of the decree for partition, and that execution proceedings taken by either one shareholder or the other are proceedings on account of both the shareholders. The *necessary* result of proceedings taken by the

plaintiff in such a case is to divide off the share of the defendant, and such proceedings have the same effect as if they had been originated in the name of the defendant. (*Sheikh Khoorshed* v. *Nubbee*, I. L. R., 3 Calc., 551.) The decree in this case was hardly a "decree passed jointly in favour of more persons than one" within the meaning of the first part of Expl. I. And in *Hikmat Ali* v. *Waliunnissa*, (I. L. R., 12 All., 506 at p. 508) Edge, C.J., and Tyrrell, J., observed that should the question in the case of *Sheik Khoorshed* v. *Nubbee* arise, they would not be prepared to follow that decision. Where a decree for partition showed that each of three sets into which the owners of the whole property were divided, was entitled to one-third of the property in suit, and it was decreed that if the plaintiffs did not have the partition of the lands carried out within two months from the date thereof, *any one* of the parties (whether plaintiff or defendant) might execute the decree and take possession after partition, it was held by a Division Bench that such a decree should not be regarded as a *separate* decree in the interest of each of the three parties, but as a *joint* decree within the meaning of Expl. I, art. 179. (*Mohun Chunder* v. *Mohesh*, I. L. R., 9 Calc., 568.) The decree for partition in this case was *expressly* in favour of *each* of the three sets of parties, *whether plaintiff or defendant*. But the decision (I. L. R., 9 Calc., 568) can be supported only if the decree in the case could be treated as a "decree passed *jointly* in favor of" the three sets of parties within the meaning of the second part of the first paragraph of Explanation I. On a principle similar to that laid down in I. L. R., 3 Calc., 551, it has been held in Bombay that an application by any of the parties to a (properly drawn up) partition decree will keep it alive in *favor* of a subsequent application by any of the other parties to the decree. (*Narayan* v. *Vittal*, Bombay Printed Judgments, 1886, p. 287.) But where a decree consisted of two parts, one in favour of the plaintiffs against the defendant, entitling them to have their share in the property in suit set apart, and the other enabling them to have a partition *inter se* of such joint share on the younger of them coming of age, it was held that a joint application for the execution of the former part will not afford a fresh starting point for the period of limitation in respect to an application by one of the plaintiffs in execution of the latter part of the decree. (*Yeshwantrao* v. *Krishnabai*, Bombay Printed Judgments, 1887, p. 72; Rivaz, 4th ed. p 295.) In this case the plaintiffs virtually obtained *two* separate decrees, one jointly by all the plaintiffs against the defendant, and the other in favor of everyone of the plaintiffs against the other plaintiffs.

Partition decree — execution.

It may be observed that whether the second part of the first paragraph of Expl. I, art. 179, be or be not applicable to decrees for partition, it has been held that an application by a party to the suit for effecting a partition, after the rights of the parties have been determined by the preliminary decree, is not an application for execution but an application in a pending suit which cannot be barred by art. 178 or art. 179 or any other article in the Limitation Act. (See *Dwarka* v. *Borinda*, I. L. R., 22 Calc., 425; p. 878 *supra*.) An interlocutory decree for partition determining the rights of the parties is held to be final for the purposes of an appeal. (*Dalhin* v. *Radha*, I. L. R., 19 Calc., 463 F. B.) And to such an interlocutory decree, the provisions of art. 179 have often been *assumed* to be applicable. (See I. L. R., 3 Calc., 551; I. L. R., 9 Calc., 568; *Seshan* v. *Rajagopala*, I. L. R., 13 Mad., 236; *Ramasami* v. *Anda*, I. L. R., 14 Mad., 252.) In *Seshan* v. *Rajagopala* it was observed by the Court that, though in a suit for partition the share of *each* of the coparcenars may be

Application (after preliminary decree) for effecting partition.

ascertained and awarded, yet *the actual direction* in a particular decree for partition *may* make it a *joint* decree. (I. L. R., 13 Mad., at p. 239.)

Fresh suit for partition. It has been held in Bombay that a decree for partition declaring the plaintiff's right to a one-sixth share of certain properties, if not executed within the time allowed by art. 179, is a bar to a fresh suit. (*Jamsang* v. *Gayabhai*, I. L. R., 16 Bom., 408.) But a different opinion has been expressed by the Allahabad High Court. (See *Nasarat* v. *Majib*, I. L. R., 13 All., 309.) As to fresh suits for redemption under similar circumstances, see p. 852 *supra*.

Complex decree. Where a decree is of a complex nature, and grants different kinds of *relief* to be obtained by processes of different kinds, *separate* applications for execution may be made. A decree for possession of land, mesne profits and costs may be executed as regards one or two of the reliefs granted, and such partial execution did, under the old law, keep alive the decree as regards the other reliefs. (See *Ram Buksh* v. *Madat Ali*, 7 N.-W. P., 95; see also *Burodakant* v. *Ramkishore*, 8 W. R., 99; *Jogesh* v. *Kalee*, ibid, 274; *Doyamoyee* v. *Nilmonee*, 25 W. R., 70.) In this last case, it was held that so long as one part of an indivisible decree (for several items of property and for costs) is being executed, the whole is kept alive so far as limitation is concerned. In some of the other cases the decree for mesne profits was not a complete or perfect decree when the decree for possession was executed. In the case of a decree which is *perfect* for execution in its *entirety* (according to Peacock, C.J., and Sargent, C.J.) a judgment-creditor can *not* be *allowed* to execute it in part. (*Haro* v. *Taruck*, 11 W. R., 489; *Dolichand* v. *Bai*, I. L. R., 15 Bomb., 242.) But there is no *express* provision in the Code of Procedure which prevents separate applications for execution as regards each of *several* reliefs given by one and the same decree. (*Radha Kishen* v. *Radha Pershad*, I. L. R., 18 Calc., 515 at p. 516.) Sec. 43 of the Code does not apply to execution proceedings, and when a decree gives reliefs of a different character, *separate and successive* applications for execution may be made as regards each of them. (*Radha Kishen* v. *Radha Pershad*, I. L. R., 18 Calc. 515.) It has been held in Bombay that an application for execution of a decree for costs against A and B is a step in aid of execution of the same decree for possession of property against A. (*Kalidas* v. *Varjivan*, I. L. R., 15 Bomb. 245, note.)

Acknowledgments and payments. As to acknowledgments and payments, see notes under secs. 19 and 20, and p. 929 *infra*.]

* 180.—To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council.	Twelve years ...	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that, when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.	Art. 180.

[Sec. 19, Act XIV. of 1859, which corresponded to this article, spoke of all decrees of *Courts established by Royal Charter*, but it was held that the section did not apply to decrees of the High Courts on their *Appellate* sides. (See *Aruna Chella* v. *Veludayan*, 5 Mad., 215; *Ramchurn* v. *Lukhee*, 16 W. R., F. B., 1; *Kristokinker* v. *Burrodakant*, 17 W. R. 292, P. C. and p. 194, *supra*.) Art. 169 of Act IX. adopted these rulings and *expressly* referred to decrees of such Courts in the exercise of their *Ordinary Original Civil Jurisdiction*. Art. 180 of Act XV. re-enacts the same rule. The Punjab Chief Court is not a Court established by Royal Charter. It was doubtful whether what are termed the decrees of the Privy Council were subject to any limitation. (See the remarks of the Privy Council in 17 W. R., 292, on the Calcutta Full Bench ruling in 16 W. R., F. B., 1.) Sec. 21 of Act VI. of 1874 *expressly* applied the twelve years' rule to the execution of an order of Her Majesty in Council. An order of Her Majesty, made on the recommendation of a committee of Her Privy Council, does no more than prescribe what shall be the final decree in the cause. As to the procedure which should be observed in enforcing such an order, see *In re Barlow* v. *Orde*, 18 W. R., 175 P. C.; *Gooroo* v. *Hunoman*, 20 W. R., 419, and sec. 610 of the Code.

Chartered Courts.

P. C. decrees.

In England, the right to issue execution on a judgment was limited to a much shorter time. This was, at common law, a year and a day,

English law.

* See sec. 325*a* of the Civil Procedure Code, and the foot-note under No. 179.

English law. Limitation.

but was extended to six years by the Common Law Procedure Act of 1852; that provision is now repealed, but by Rules of the Supreme Court, 1883, Order 42, Rule 22, as between the original parties to a judgment, execution may issue at any time, within six years from the recovery of the judgment and by Rule 23, even after the expiration of the six years with the leave of the Court or Judge. But execution cannot be issued on a judgment when more than twelve years have elapsed since the date of the judgment, and there has been no acknowledgment or payment in respect of the judgment debt. (*Darby* and *Bosanquet*, 2nd ed., 169.)

Judgment of Insolvent Court entered up by the High Court.

According to Sergeant, C.J., a judgment entered up under sec. 86 of the Indian Insolvent Act is *not* a judgment of the High Court in the exercise of its *Ordinary Original Civil Jurisdiction*, and the right to enforce the judgment cannot be lawfully *released* by *any* person. (In the matter of *Candas Narrondas*, I. L. R., 11 Bomb., 138.) But according to West, J., the *right* to enforce such a judgment under art. 180 accrues to the Official Assignee when the *order* of the Insolvent Court *to take out execution* is made and not until then. (*Ibid.*) Their Lordships of the Privy Council agree with West, J., and hold that art. 180 applies to the case, and that a present right accrues to the Official Assignee when the Insolvent Court, in the exercise of its discretion, orders *execution* to be taken out upon the judgment so entered up. (S. C. on appeal, I. L. R., 13 Bomb., 520, P. C.) Articles 151 and 162 speak of the *High Court* in the exercise of its *Original Jurisdiction*. *Original* is opposed to *Appellate*. *Ordinary* is opposed to *extraordinary*. The Court assumes extraordinary jurisdiction at its *discretion* upon *special* occasions and by *special* orders. (I. L. R., 13 Bomb., 520, at p. 533 P. C.)

Ordinary Original Jurisdiction.

"Right to enforce."

A present right to *enforce* payment is something more than a present right to *receive* payment. (See *Hornsey* v. *Monarch*, 24 Q. B. D. 1, at pp. 6, 9, 11.)

"Capable."

"Capable of releasing the right."—This excludes persons who are legally incapacitated, such as, infants and lunatics. (*Ibid.*)

P. C. Appeals.

An order of the Privy Council *merely affirming* the decree of the High Court is none the less governed by this article. (See p. 904 *supra*, and *Luchman* v. *Kishun*, I. L. R., 8 Calc., 218, F. B.) An order rejecting an application for leave to appeal to Her Majesty in Council under secs. 598 and 601 of the Code, is treated as if it were an order of the *Court whose decree was complained of*. (See *Hurro Pershad* v. *Bhupendro*, I. L. R., 6 Calc., 201.) See pp. 903-4 *supra*.

Revivors.

As to *revivors* see *Ashootosh* v. *Durgachurn*, I. L. R., 6 Calc., 504; and p. 49, *supra*. The process of *reviving* a judgment has its equivalent in the proceeding prescribed by sec. 248 of the Code of Civil Procedure, and the order for execution made under that section (after notice to show cause why execution should not issue) *revives* the decree within the meaning of this article. In *Tincowrie* v. *Debendro*, I. L. R., 17 Calc., 491, Mr. Justice Wilson *doubted* the correctness of the ruling in I. L. R., 6 Calc., 504. (See also p. 929 *infra*.) But Tottenham and Amir Ali, JJ., have followed that ruling without any hesitation. (See *Futteh Narain* v. *Chundrabati*, I. L. R., 20 Calc., 551.) The Madras High Court also approved and followed the ruling in 6 Calc. (*Ganapathi* v. *Balsundra*, I. L. R., 7 Mad., 540.)

An application for the transmission of a certified copy of the decree to another Court is not an application for *execution*. It is not necessary to issue a notice under sec. 248 on an application for such transfer. Even if a notice is issued and an order is subse-

quently made for the transfer of the decree, such order is not an order for *execution* and has not the effect of a *revivor*. (*Suja Hossein* v. *Rehamut*, I. L. R., 22 Calc., 921.) If the decree-holder does not apply for execution to the Court to which the decree is transferred within the 12 years allowed by art. 180, his application will not be saved from the bar of limitation simply because his application for the transfer was made within the 12 years. (*Ibid.*)

English law. Revivor.

The sections of the English Common Law Procedure Act of 1852 relating to revivor have been repealed, and the procedure substituted for the writ of revivor is to be found in Rules of the Supreme Court, 1883, Order 42, Rules 22 and 23. Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or Judge for leave to issue execution, and such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. It may be *doubted*, however, if such an order for leave to issue execution would give a new period from which the statute runs afresh. (Darby and Bosanquet, 2nd ed., pp. 179, 180.)

Does order for leave to issue execution give a new start?

Acknowledgments and payments.

As to acknowledgment under this article, see pp. 276, 284, 291, and 292, *supra*. As to payments under this article, see pp. 291, 292 and 322, *supra*. Nothing is said in this article as to *when* a payment must be made or an acknowledgment given, and the question arises whether this article is not controlled by the provisions of secs. 19 and 20 ; that is, whether the payment or the acknowledgment must not be made before the expiration of the prescribed period of 12 years. See pp. 291, 292, *supra* and *Purnanand Das* v. *Vallabdas*, I. L. R., 11 Bomb., 506, 509, 510, 513. Uncertified payments made out of Court may be availed of as an answer to a plea of limitation. (Ibid. See also *Fakir* v. *Madon*, 4 B. L. R., 130 F. B. ; *Zahur* v. *Buktawar*, I. L. R., 7 All., 327, and other cases cited at p. 869, *supra*.)

Difference between arts. 179 & 180.

There is a great difference between arts. 179 and 180. The former allows a period of *three* years from the date of the decree or order, whereas the latter allows *twelve* years, not from a *fixed* starting point, such as the date of the decree or order, but from a point of time that is *dependent* on the *right* to *enforce* the judgment. (In the matter of *Chandas Narondas*, I. L. R, 13 Bomb., 520 at p. 531 P. C.)

Sec. 230 of the Code does not control art. 180.

According to the *express* provisions of art. 180, the decree-holder is entitled to a *fresh* period of *twelve* years from the date of *every* revivor, payment or acknowledgment. The limitation provisions of sec. 230 of the Code cannot therefore apply to applications for execution referred to in this article. (See *Magubhai* v. *Tribhuvandas*, I. L. R., 6 Bomb., 258 ; *Ganapathi* v. *Balasundara*, I. L. R., 7 Mad, 540 ; *Futteh Narain* v. *Chundrabati*, I. L. R., 20 Calc., 551.) A *general* later Act does not repeal, control or alter a *special* law unless there are *express words* to indicate that such was the intention or unless such an intention appears by *necessary implication*. Sec. 230 of Act XIV. of 1882 cannot therefore control or modify the provisions of art. 180 of Act XV. of 1877. (See pp. 216, 885 *supra*.) A limitation clause *in a general Code of Procedure* may be modified by a subsequent Law of Limitation. (*Phoolbas Koer* v. *Lalla Jogeshur*, I. L. R., 1 Calc., 226.) The Limitation clause in section 230 of Act X. of 1877 was therefore overridden by art. 180 of Act XV. of 1877. Art. 179 expressly refers to sec. 230 of the Code of Civil Procedure—so that the decrees of the *ordinary* Civil Courts *are* governed by the provisions of sec. 230 of the Civil Procedure Code of 1882. (See sec. 3, Act XIV of 1882.)

INDEX.

N.B.—(Sec. 13) = section 13 of Act XV of 1877.
(Art. 171) = article 171 of Schedule II, Act XV of 1877.

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ADDENDA.

ALTHOUGH it has been established that an executor may pay a debt barred by the Statute of Limitation without being guilty of a devastavit, he may not pay such a debt after it has been *judicially* declared by a Court of competent jurisdiction that it is barred by the Statute. (Midgley *v.* Midgley, 1893, 3 Ch. 282.) P 4, (Barred debts. Executors and Hindu widows.

The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her husband's property. (Udai *v.* Ashutosh, I. L. R., 21 Calc. 190.)

On the question of laches in the case of a claim against the Directors of a Company, see also Kathiawar *v.* Virchand, I. L. R., 18 Bom, 119 at pp. 124, 131. P. 61 (Laches.)

It has been held by their Lordships of the Privy Council that a *fraudulent* intention is by no means necessary to create an estoppel. It is *not necessary* that the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. The principle on which the law of estoppel rests is, that it would be most inequitable and unjust to the person who was induced to act in a way in which he would not otherwise have acted, if the person whose representation or conduct induced him so to act were allowed to deny or repudiate the effect of his representation to the loss or injury of the person who acted on it. (Sarat *v.* Gopal, L. R., 19 Ind. App. 203; I. L. R., 20 Calc., p. 296, P. C.) Pp. 65, 72, 73, (Equitable Estoppel.)

As to compensation to tenants for improvements, on eviction, see Dunilal *v.* Gopi, I. L. R., 22 Calc., 820. Where there has been acquiescence on the part of the landlord, see Yeshwada *v.* Ram Chandra, I. L. R., 18 Bom., 66. P. 71, note.

Even where the defendant or judgment-debtor does not appear, and the Court has not got before it the information necessary to decide the question of limitation, it ought to compel the plaintiff or applicant to furnish that information. (Ramu Rai *v.* Dayal, I. L. R., 16 All., 390 at p. 393.) P. 82, (Plea of limitation abandoned.)

On the question of estoppel by verdict, compare Parthasaradi *v.* Chinnar, I. L. R., 15 All., 327. P. 83, note 7.

On the question of limitation *against the defendant*, see also Orr *v.* Sundara, I.L.R., 17 Mad., 255; and *in re* Marshfield, 34 Ch. D. 721. See p. 329 *infra*. P. 85, (Limitation against defendant.)

A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off. (Chennappa *v.* Raghunath, I. L. R., 15 Mad., 29.) The Court fee on such claim may be paid or levied even after the date when the claim would be barred by limitation. (Rajah Papamma *v.* Sitaramayya, 5 Mad. L. J., 233.) Pp. 85, 86. (Limitation-Set-off.)

As to the *proprietory possession* of landlords through tenants, see Ram Raj *v.* Girnandan, I. L. R., 15 All., 63 at p. 64. P. 114, note.

P. 128, note 9. (Squatter's possession.) "It was assumed in the argument that a mere squatter would have had a good defence from sufficient length of possession. We are of opinion that the law gives no special privilege to the length of squatting possession." Per Lord Justice James in Vane *v.* Vane, L. R., 8 Ch. App. 383 at p. 397.)

P. 151, note 1. When a usufructuary mortgage is satisfied out of the usufruct (and not redeemed by any one of several co-mortgagors), each co-mortgagor is entitled to take possession of his own share, and if any one of the co-mortgagors take possession of the share of any other of them such possession is adverse to the latter, and a suit by the latter to recover possession is governed by art. 144. (Gobardhan *v.* Sujan, I. L. R., 16 All. 254. See also p. 864 *infra*.)

P. 153, (Adverse possession of mortgaged estate.) A mortgagor does not represent the estate completely, such as a Hindu widow or a sebait does. (Soshi *v.* Gogan, I. L. R., 22 Cal., 364 at p. 371.) As to the adverse possession of mortgaged estates, see Chinto *v.* Janki, I. L. R., 18 Bom., 51.

P. 158, (Adverse possession.) There may be possession adverse to the ownership of a *Matha* although there is no *lawful* manager of the *Matha* for 12 years and upwards. (Vithal-boa *v.* Narayan, I. L. R., 18 Bom., 507 at p. 511.)

P. 169, (Abandonment.) As to the abandonment of possession by an intruder, see also Willis *v.* Earl Howe, 1893, 2 Ch. 545 at pp. 550 and 553.

(P. 184. Date of decree.) The 15 days allowed by the decree are to be counted from the date of the final or appellate decree. See also Nam Narain *v.* Lala, I. L. R., 22 Calc., 467.

P. 195, note 2. (Proceedings of the Legislature.) Their Lordships of the Privy Council have very recently thought it right to express their dissent from the proposition that proceedings of the Legislature which result in the passing of an Act may be referred to as legitimate aids to the *construction* of the clauses of the Act. These considerations should be *excluded* when the clauses of a British Statute as well as of an Indian Act are under construction. (Administrator-General *v.* Premlall, I. L. R., 22 Calc., 788 P. C.) See a learned article on this subject in 5 Mad., L. J., 280. See also Kadir *v.* Bhowani, I. L. R., 14 All., 145; Gopal *v.* Sakhoji, I. L. R., 18 Bom., 133.

Pp. 204, 209. As to what is rule of *substantive* law and how far a substantive or adjective law may be retrospective, see Jogodanund *v.* Amrita, I. L. R., 22 Calc., 767 F. B.; Hajarat *v.* Valiumissa, I. L. R., 18 Bom., 429.

P. 219, note 8. (Construction of sec. 6.) The question has been again discussed by a Full Bench of the Madras High Court, and it has been held that sec 7 of the Limitation Act cannot be applied to suits under sec. 77 of the Registration Act, III of 1877, inasmuch as the latter is a special Act 'complete in itself." (Veramma *v.* Abbya I. L. R., 18 Mad., 99 F. B.) According to Collins, C.J., and Shephard, J., the authorities on the construction of sec. 6, Act XV of 1877, are shaken by the Calcutta Full Bench decision in I. L. R., 18 Calc., 368.

Pp. 221, 222. As to what a plaintiff's "cause of action" means and includes, see Lord Esher's and Lord Justice Fry's definitions cited in I. L. R., 16 All., 165 at p. 170.

P. 253, note 5. (Order for and actual issue of probate.) It may be observed that an executor who has not intermeddled with the assets of the testator cannot be sued by a creditor until he has *actually* obtained a grant of probate. An *order* for probate does not make the executor the legal representative of the testator. (Mohamidu *v.* Pitchey, 1894, A. C. 437.)

A Hindu subject of the Native State at Bikaneer, applying for probate or letters of administration in British India under Act V of 1881, does not for the purposes of *that Act* attain majority before he completes his eighteenth year. (In the goods of Sewnarain, I. L. R., 21 Calc., 911.)

P. 254, note 8 (Majority of subjects in Native States

On the applicability of sec. 7 to cases where *some* of the claimants are minors, see also Vigneswara *v.* Bapyya, I. L. R., 16 Mad, 436.

Pp. 271, 272, Secs. 7 & 8.

The form and the manner of the signing must be such as is usually adopted by the class of men to which the debtor belongs, with the view of showing that they intend to be bound by the document Custom in the case of such debtors, (as necessity, in the case of marks by illiterate debtors) renders in for malsignatures effective under sec. 19 of Act XV. (Gangadhar *v.* Shidramapa; I. L. R., 18 Bom., 586).

P. 285. (Informal signatures.) Section 19.

A suit brought *upon* an unstamped statement of account in the handwriting of the defendant cannot be decreed, but if a suit is for goods sold and delivered, the statement of account may be used for the *collateral* purpose of showing an acknowledgment of an existing *liability* in respect of goods sold. It cannot be *acted upon* as an acknowledgment of a *particular* sum being due. (Fatechand *v.* Kisan, I. L. R., 18 Bom 614.)

P. 287. (Unstamped acknowledgment.) Section 19.

Where there were two debts due to the same creditor, one on a mortgage bond and the other on a simple bond, and the terms of the acknowledgment relied upon are satisfied by reference to the former, an acknowledgment in respect of the latter is not proved within the meaning of sec 19. (Beti *v.* Collector, I. L. R., 17 All., 198 P. C.)

P. 296. (Several debts of the same debtor.) Section 19.

An admission by the defendant that he was liable to be turned out of possession by the plaintiff or an admission by the defendant that the plaintiff had a right of possession as against him, may under sec. 19 operate to keep alive a claim to immoveable property. (See Mylapore *v.* Yeokay, I. L. R., 14 Calc 801 at p 808 P. C.)

Pp. 299-300. (Acknowledgment of claim to immoveable property) Section 19.

It has recently been held in Madras that the guardian of a minor *has* authority to acknowledge a debt on behalf of the minor. (Sobhandry *v.* Sriramulu, I. L. R., 17 Mad 221.) An acknowledgment by the Court of Wards would, it seems, bind the ward; so would an acknowledgment by a *sarbarakar* or manager of the estate of an infant or a lunatic, provided the debt affects the *estate*. The *sarbarakar* not being a guardian cannot acknowledge a *personal* liability. (Beti *v.* Collector, I. L. R., 17. All. 198 P.C.)

P. 300. (Guardian's acknowledgment.) Section 19.

See Tucker *v.* Tucker, 1894, 3 Ch. 429 at pp. 435, 437, 438. (Peculiar case of a retiring partner being bound by payments made by the continuing partners.)

Pp. 303, 625. (Sec. 21).

The word "interest" is now commonly used in law in two senses— (1) When it is payable under a *contract*, and recoverable as a part of the debt itself. It is in such a case the value *promised* for the *use* of money. (2) When it is awarded by the Court as *compensation* for *withholding* money. (See Thayar *v.* Lakshmi, I.L.R., 18 Mad. 331 at pp. 333, 334.) Art. 63 of Act XV of 1877 applies to suits for interest proper which becomes *due* under a contract made by the parties, that is, it applies to suits for *contractual* interest (whether *ante diem* or *post diem*) for which there may be successive or recurring causes of action. It does not apply to claims for interest *as damages*, that is, to suits in which such damages are awarded by the Court once for all, as compensation for withholding payment of the debt on and after the due date. Claims for such interest *post diem*,

Pp. 317, 703, 800, 801. Arts. 63, 132. (Interest *ante diem* and *post diem*. Damages. Act XXXII of 1839.)

by way of *damages*, are governed by art. 116 or 115, according as the *contract* to pay on the due date, is *registered* or *not*. (See I. L. R., 10 All., 85; I.L.R., 11 All., 416; I. L. R., 19 Calc., 19; I. L. R., 19 Calc., 23; I. L. R., 18 Mad., 331; I. L. R., 18 All. 58 F. B.).

Two rules of Act 32 of 1839.

Claims for interest under the first rule enacted by the Interest Act, XXXII of 1839, for withholding payment of sums certain *payable on a certain date* are claims for compensation to which art. 115 or art. 116 applies. (*Ibid.*) A claim for interest as damages, in cases under the second rule enacted by Act XXXII, for withholding payment of sums certain from the date of a *written demand*, not being a claim for compensation for breach of a *contract* to pay on a certain day, is not governed by art. 115 or art. 116. By the common law, *i.e.*, the law and practice in India, *independently* of the two rules enacted by the Interest Act, interest may (according to the proviso to the Act) be awarded in a few *other* cases, *e. g.*, in suits for mesne profits or for contribution. (Hurro Prosad *v.* Shama Prosad, I. L. R. 3 Cal., 654, P. C.; Nullit *v.* Prosunno, 17 W. R., 179.) A claim for interest in such cases, not being cases of breaches of *contract*, is also not governed by art. 115 or art. 116.

Mesne profits, and contribution.

Mercantile securities, and mortgages.

In the case of mercantile securities and mortgages, interest by way of damages is as much interest as if it were recovered in any other shape. In the case of a mercantile security, it is to be supposed that the parties intended interest to run on at the *old rate* if the money was not paid at the day. And according to the principles of equity with regard to the redemption of mortgages, although the day for payment has passed and there is no provision with the creditor for payment of interest after that day, the Court will assume that interest is payable after the day at the *same rate* as before. What has to be paid by the debtor may *technically* be called damages, but they are damages of a *peculiar* kind, for it would not be left to a jury to regulate their amount; the jury would be directed as a matter of law to find damages of the same amount as the interest which would have been payable, if the covenant had extended over the period. (Gordillo *v.* Waguelin, L. R., 5 Ch. 287 at p. 303.) The rate to be awarded would *prima facie* be the old rate. (I. L. R. 17 All. 511 P. C.) Three years previously to the case in 5 Ch., Lord Selborne, in Cook *v.* Fowler, (L. R., 7 H. L., 27) said: "There is *no rule of law* upon a contract for the continued payment of money on a certain day, with interest at a fixed rate down to that day, that a further contract for the continued payment of interest at the *same rate* is to be implied." And Lord Cairns in the same case observed that it would be for the Court to consider the position of the claimant, and the sum which properly and under all the circumstances should be awarded for damages in lieu of interest.

Old rate of interest.

Interest *post diem*, whether a charge on the mortgaged property, and if so, *when*.

In a suit on a mortgage bond in which the plaintiff claimed nearly twelve years' interest *post diem* Collins, C. J., and Parker, J., held that the joint effect of the Interest Act (XXXII of 1839) and the Transfer of Property Act (IV of 1882) was in favour of the award of such interest (by way of damages) till date of payment, at a *reasonable* rate and as a *charge* upon the mortgaged property. The question of limitation, however, was not noticed in the judgment. (Rama Reddi *v.* Appaji, I. L. R., 18 Mad., 248.) Muttusami Ayyar, Best and Subramania Ayyar, J.J., have held following the Allahabad decision in Manseb Ali *v.* Gulab, I.L.R., 10 All., 85, and the Calcutta decision in Gudri *v.* Bhubaneswari, I.L.R., 19 Cal., 19, that even in cases of mortgages and hypothecation bonds, interest *post diem*, by way of damages for withholding payment, cannot be recovered after the expiry of the period of limitation for suits for compensation for breach of contract. (See Badi Bibi *v.* Sami, I. L. R., 18 Mad., 257; and Thayar *v.* Lakshmi, I. L. R., 18 Mad., 331.) It has been pointed out in the latter case, that interest

post diem awarded under Act XXXII of 1839 being awarded as damages or compensation, a claim for such interest in a suit on a mortgage bond may, if at all, be a *charge* on the property, only where it is not barred by limitation under art. 115 or art. 116. (I.L.R., 18 Mad., 331, 338.) It has been held by a Full Bench of the Allahabad High Court that even in a mortgagee's suit for sale, interest awarded under Act XXXII of 1839 by way of damages is realizable only as a *simple money decree*, and that no such interest can be claimed by the mortgagee after the expiry of three years under art. 115 or six years under art. 116 (as the case may be) from the date when the contract for the payment of the mortgage money was broken. (Norindra *v.* Khadira, I. L. R., 18 All., 581, F. B.) All. F. B. cases.

It has been very recently held by their Lordships of the Privy Council that, even where there is no covenant in a hypothecation bond for the payment of interest *post diem*, the plaintiff would be entitled on default being made in the payment, to recover interest *technically* as *damages*, and that the rate would *prima facie* be the same as that provided by the bond for the period *before* the fixed date of payment, although there is no rule of law making that rate *necessarily* the measure of the damages. (Chajwal Das *v.* Brij Bhakan, I. L. R., 17 All. 511 P. C) In this case their Lordships allowed such interest for nearly twelve years (after the due date) at the contract rate of interest which was 15 per cent per annum. The suit was instituted by the mortgagee or hypothecatee very nearly 12 years after the contract for payment had been broken. But as the respondent did not appear before their Lordships, no question of limitation as regards the period when, and for which, interest *post diem* may be claimed appears to have been raised in argument. Their Lordships in their judgment also do not notice this, or the two following questions: (1) Whether in the case of a *mortgage* bond interest *post diem* by way of damages, is awarded under Act XXXII of 1839, or under the common law as it stood before that Act was passed. (2) Whether such interest *post diem* is a *charge* on the property hypothecated, or is realizable as a *money decree*. It may be observed that under the Act of 1839 the Courts can not award interest at a rate exceeding the *current* rate of interest, and that the rate at which the Lordships awarded interest exceeded the *bazar* rate as well as the Court rate of interest. Recent Privy Council decision.

The special provision of sec. 42 of 3 and 4 Will. 4, c. 27, is *equally* operative to prevent the mortgagee from recovering more than *six* years' arrears of interest in a *redemption* suit instituted by the mortgagor, as it would be in the case of a *foreclosure* suit by the mortgagee, since although a suit for redemption can not be considered as a suit for *recovering* money, yet the terms of the redemption must be the same. (Coote, on mortgages, 4th ed. 905; Thayar *v.* Lukshmi, I. L. R., 18 Mad. at pp. 336, 337; Banning on Limitation, 2nd ed. 173; Darby and Bosanquet, 2nd ed. 204-206.) But English authorities on the question of limitation in respect of arrears of interest form no useful guides for determining that question in British India. The provisions on this subject of the Laws of Limitation in the two countries differ in important respects. (Thayer *v.* Lukshmi, I. L. R., 18 Mad., 331 at p. 337.) English Law of limitation as regards interest.

But where the only right extinguished by limitation is the plaintiff's right to immediate or *khas possession* of the land, his title as landlord to receive *rent* from the defendant is not extinguished thereby. (Vithal-bowa *v.* Narayan, I. L. R., 18 Bom., 507.) P. 326, note 4, (Sec. 28)

Sec. 28 has no application to persons who are in possession and who have had no occasion to sue for recovery of possession. (Orr *v.* Sundra, I. L. R., 17 Mad. 255.) P. 329, note 2. (Sec. 28.)

P. 330 Trees. As to the possession of trees being possession of immoveable property. *See* also Bapu *v.* Dhondu, I. L. R., 16 Bom., 353.

Pp. 332, 823 (Sec. 28. art. 141.) Hindu widows. If a Hindu widow is in possession, *claiming* an *absolute* title (and not merely the *limited* estate of a Hindu widow) to the exclusion of the son and the son's widow, such possession for 12 years extinguishes the rights of the son and the son's widow as well as those of the reversionary heirs. (Lochan *v.* Manorath, I. L. R., 22 Calc., 445, P. C.) A case of a Hindu widow *dispossessing* the true heir is not governed by the rule (old or new) as to a dispossession *suffered* by her. So far as the heirs of the husband are concerned, they cannot claim the property after 12 years' dispossession unless the widow, when she takes possession, *claims* only the *limited* estate of a widow. In the Privy Council case the *son's widow* was alive at the date of the suit, and it was not necessary to consider whether under the new law a dispossession *suffered by her* could or could not affect the reversionary heirs after her death. See pp. 823, 824 *infra*.

P. 349. Navigable rivers. As to fishery rights in, and beds of, navigable rivers, see also Satcowrie *v.* Secretary of State, I. L. R., 22 Calc., 252.

P. 353. As to riparian rights see also Orr *v.* Rawan, I. L. R., 18 Mad. 320 at p. 324.

P. 355, note 6. As to licenses for trapping elephants in another's forest, see Ramkrishna *v.* Unni, I. L. R., 16 Mad. 280.

P. 356, note 5. As to whether a given right is a mere license, see Vishnu *v.* Rango, I. L. R., 18 Bom. 382 at p 386.

P. 357. (Custom and easements. "We are of opinion that due regard was had to the distinction between custom as the *source* of an easement, and an easement as a distinct *right* in itself. An easement is a right existing in a particular *individual* in respect of his land, whilst custom is a usage attached to a *locality*. Though a customary right belongs to no individual in particular, yet it is capable of being enjoyed by all those who for the time being own land in the locality to which the right attaches. The distinction is explained in Mounsey *v.* Ismay (3 H. & C. 486), and the rule of law is that, if a custom is shown to exist under which individuals of a class may obtain independent rights in respect of their land, which would be easements if acquired by grant or prescription, those rights are nevertheless easements, though acquired by reason of the custom" (Per Shephard and Best, JJ., in Orr *v.* Raman, I. L. R., 18 Mad. 320 at p. 325)

P. 361, note 5. (Sub-soil of roads.) Sec 17, Bombay District Municipal Act VI of 1873, which vests streets in the Municipality, though it gives perhaps only a *limited* estate, yet gives *not merely the bare surface* of the ground, but so much above and below it as is requisite or appropriate for the preservation of the streets for the usual and intended purposes. (Nayar *v.* The Municipality of Dhandadhuka, I. L. R. 14 Bom. 490.)

Sec. 30 of the Bengal Municipal Act III of 1884 (B. C.), as amended by Act IV of 1894, confers the *full* proprietory right in the sub-soil of public roads on the Commissioners. See Collier's Bengal Municipal Manual, 3rd ed, p. 28.

Pp. 365, 645. (Trees encroaching on another's land.) In Naik Persotam *v.* Gandrap, I. L. R., 17 Bom., 745, it was *assumed* that it was possible to acquire a prescriptive right to have the branches of trees overhang the land of a neighbour. But in Lemmon *v.* Webb, 1894, 3 Ch., 1, the Court of Appeal held that the overhanging branches may be cut down by the person on whose land they overhang, although they have been allowed to do so for more than twenty years. There is no authority for the contention

that the owner of the tree acquired a right to the occupation of so much of the space as was covered by the projecting boughs, either by the Statute of Limitation or by prescription. The decision of the Court of Appeal has been affirmed by the House of Lords, 1895 A. C. I. The Lord Chancellor held that the owner of the tree and the overhanging branches could not acquire a right *to the land* over which they have overhung or *to their overhanging* such land under the Statute of Limitations, and that he could not possibly have obtained a prescriptive right under the ordinary law of prescription. "The trees, of course, grow from time to time, and their state each year is different from what it was the year before. The tree of to-day is not in the condition in which it was twenty years ago. It would be idle to suggest that the right gained at any time was the right to have the tree there in the condition in which it was twenty years before, and that it was only open to the adjoining owner to put back the tree into the condition in which it then was. The removal of what had grown in the meantime would, of course, be almost always, if not always, completely destructive of the tree. It seems to me impossible to say, in a case of this description, that a right is gained either by the Statute of Limitations or under the ordinary law of prescription." (Per Herschell, L. C.)

Varying conditions of growing trees.

A plaintiff can have no exclusive *right* to repair or cleanse a tank or other property common to him and the other villagers, without a corresponding *obligation* imposed on him to do so. (Sivaraman *v.* Muthaya, I. L. R., 12 Mad., 239 at p. 249.) Disputes for the purpose of *bearing* a charge, though very uncommon, must, like ordinary disputes for the purpose of *avoiding* a charge, be settled by law. Voluntarily executing repairs without dispute on several occasions does not impose any obligation and therefore can not confer an exclusive right to repair.

P. 366. (Exclusive right to repair at one's own costs.)

A right of easement cannot be *adversely* acquired by a tenant against his landlord. (Udit *v.* Khasi, I. L. R., 14 All., 185.) Long user of a particular plot of land by a tenant for a particular purpose may however lead to a presumption that such user was part of the *contract* of tenancy. (Dalel *v.* Bhajju, I. L. R., 16 All., 181).

P. 367, and 368. (Tanant's easement against landlord.)

Erecting a *building* overhanging the land of another person is a trespass. (Fay *v.* Prentice, 1 C. B., 828, cited by Kay, L. J., in Lemmon *v.* Webb, 1894, 3 Ch. 1, at p. 21.) But nailing a board to a wall so that the board overhangs the land of another is not a trespass but only a nuisance. (Pickering *v.* Rudd, 4 Comp., 219, cited at page 20 *ibid.*) The encroachment of the boughs and roots of a tree over and within the land of an adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. (Per Kay, L. J., in Lemmon *v.* Webb, *ibid*, page 24.)

P. 382. (Projections over another's land.)

The invasion of privacy by opening windows is not a wrong for which an action will lie. (Sayyad Azuf *v.* Ameerubibi, I. L. R., 18 Mad., 163.) But a *customary* right to privacy is recognised by the Courts and by the Easements Act. The customary right of privacy which prevails in various parts of the North Western Provinces is a right which attaches to property, and is not dependent on the *religion* of the owner, so that even a Christian may claim it in a town where the custom of privacy prevails. (Abdul *v.* Esmile, I. L. R., 16 All., 69.)

Pp. 383 and 385. (Privacy.)

No Court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above or below it. There is no real analogy between an artificial building or projection hanging over a man's land and the branches or roots of a tree growing *insensibly* and by *slow degrees* and thus encroaching on the space above or below the land of a neighbour. (See Lemmon *v.* Webb, 1894, 3 Ch. 1 at pp. 12 and 14.)

P. 384, note 7. (New mode of acquiring a title.)

P. 391. Act 8 of '91.

Act VIII of 1891 *extending* the Easements Act is not retrospective. (Chunilal *v.* Mani, I. L. R., 18 Bom., 616).

P. 393. (Implied grant or reservation of new easements.

The general principle is that a vendor cannot derogate from his own grant, or, in other words, that a party to a contract of sale cannot escape from the express terms to which he has agreed. In the absence of any positive law on the subject, a vendor *claiming* an *implied* reservation of a *quasi*-easement must show from the nature of the easement and the conduct of the parties that such reservation must have been contemplated by the parties at the time of sale. (Chunilal *v.* Mani, I. L. R., 18 Bom., 616 at pp. 629, 630.)

P. 395, note 3. (*Quasi*-easements.)

Lord Westbury in Suffield *v.* Brodie showed that the comparison of the "disposition of the owner of two tenements" to the *destination du pere de famille*, if it be worth grave attention, fails in the case where the owner of two tenements sells and conveys one for an absolute estate therein, for he puts an end by contract to the relation which he had himself created between the tenement sold and the adjoining tenement, and the condition of the former is thenceforth determined by the contract of alienation and not by the previous user of the vendor during the joint ownership of the two tenements. (See Chunilal *v.* Mani, 18 Bomb., 616 at p. 627.)

Pp. 396, 397. Reservation of quasi-easements in English law.

It was shown by Lord Justice Thesiger that the observations in the case of Watts *v.* Kelson could not be taken as overruling the decision of Lord Westbury in Suffield *v.* Brown. (See Chunilal *v.* Mani, 18 Bomb., 616 at p. 624.)

P. 398, note 7.

Where there is no special custom involved, the Courts "in Provinces to which the Easements Act has not been extended" must be guided by the law of England. (Chunilal *v.* Mani, 18 Bomb., 616 at p. 623) As to implied *reservation* of *quasi*-easements, the English law is different from that laid down by Act V. of 1882.

P. 401, note 8. (Custom.)

A custom to use another's land for stationing *tazias* and *alums* at the time of the Moharram must be reasonable and certain as to extent and application. The English common law principle that a custom must be immemorial does not apply to India. (Kuar *v.* Mamman, I. L. R, 17 All., 87)

Pp. 429 and 644. (Unfinished buildings and light.)

See Collins *v.* Langher, 1894, 3 Ch. 659, in which it has been held that the right to light may be claimed in respect of an unfinished house. User and enjoyment as of right and without interruption commences when the exterior walls of the building with the spaces for the windows are completed, and the building is properly roofed in, although the window sashes and the glass may not be put in, and the interior may not be finished until some time afterwards.

P. 429, note 7. Actual obstruction in the last year of enjoyment.)

An *inchoate* title under the Prescription Act cannot be treated as *complete* before the whole of the twenty years have expired. One cannot acquire a complete title to sue after an enjoyment of 19 years and 9 months, although no "interruption" of the enjoyment is *possible* in the course of the next three months. The *suit* may be instituted only *after* the expiry of the full 20 years. (See Lord Battersea *v.* Commissioners, 1895, 2 Ch. 708.)

P. 446. (Percolating water.)

The right of the owner of land to divert or appropriate percolating underground water is the same, whatever his motive may be, whether *bonâ fide* to improve his own land or maliciously to injure his neighbour or to induce his neighbour to buy him out. (Mayor *v.* Pickles, 1895, A. C. 587.)

P. 447. (Land Acquisition Act.)

Under the Land Acquisition Act I of 1894, a person shall be deemed to be interested in *land* if he is interested in an *easement* affecting the land; and "land" includes benefits to arise out of land [See sec. 3, cls. (*a*) and (*b*).]

Even a sensible diminution of light caused by the defendant's new building does not entitle the plaintiff to an injunction. There must be a large material and substantial damage, or the plaintiff's room must have been rendered unfit for the purpose for which it might reasonably be expected to be used, before interference by injunction will be ordered by the Court. (Ghanasham *v.* Moraba, I. L. R., 18 Bomb, 474.) As to the diminution of direct and reflected light, see *ibid*, pp. 478, 482 and 483. P. 452. (Diminution of light. Injunction when granted.)

The plaintiff having in a previous suit obtained a decree declaring his right of having the roof of his house projecting over the defendant's land and discharging water thereon, now sued for a declaration of his right to go upon the defendant's land for the purpose of repairing the roof. *Held* that the plaintiff was entitled to the right claimed as being *accessory* to the easement already established, but that it should be exercised only once a year and after notice to the defendants. (Hayagreeva *v.* Sami, I. L. R., 15 Mad., 286). P. 459. (Accessory rights.)

The object of consolidation is to collect the statutory law bearing upon a particular subject and bring it down to date, in order that it may form a useful code applicable to the circumstances *existing* at the time when the consolidating Act *is passed*. (Administrator-General of Bengal *v.* Premlal, 1. L. R., 22 Calc., 788 P. C.) P. 557. (Preamble, Act XV. of 1877.)

A special Regulation like Regulation No. IV. of 1876 for the Terai District may exclude the operation of the Limitation Act from a scheduled district like the Terai under the Government of the N.-W. Provinces. (Ramratan *v.* Lalta, I. L. R., 17 All., 483.) P. 558. (Scheduled Districts.)

As to rights barred under the old law, not being enforceable under the new, see Mohesh *v.* Taruck, I. L. R., 20 Calc., 487. P. 559. (Rights barred under the old law.)

A plea of estoppel *available* to the decree-holder against a person claiming the judgment-debtor's property is likewise *available* by the execution-purchaser of the judgment-debtor's property. A purchaser at a court-sale represents the judgment-debtor to the extent of such right, title and interest as he had at the date of sale, and represents the execution-creditor in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree. (Krishna *v.* Vikram, I. L. R., 18 Mad., 13.) It has been recently held by their Lordships of the Privy Council that execution-purchasers of the right, title and interest only of the judgment-debtor *are bound* by an estoppel arising out of his conduct in allowing his widow to hold herself out as the owner of the property. (Mahomed *v.* Kisory, I. L. R., 22 Calc., 909 P. C.) P. 563. Plea of estoppel by or against execution purchasers.

It has been held by Mr. Justice Hill sitting singly that the term "suit" in the third column of art. 84 of Sch. II. of Act XV. is not to be construed in the *limited* sense given to it by sec. 3. (Watkins *v.* Fox, in I. L. R., 22 Calc., 943 at p. 948.) P. 565. (Suit.)

It is particularly necessary that a Court should be careful to ascertain for itself, so far as the record enables it, whether or not an application for execution of a decree is in time or is time-barred. If it has not got before it the information necessary to decide the question, it ought to compel the applicant to furnish that information. This is the Court's duty even when the application is not opposed or is heard *ex parte*. (Rama Rai *v.* Dayal, I. L. R., 16 All., 390 at p. 393.) Pp. 567, 568. (Limitation—Court's duty.)

For the purposes of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented, and not from the date of its amendment. See also Potel *v.* Bai, I. L. R., 19 Bom., 320. P. 570. (Amendment)

P. 570. (Presentation of appeal.) The presentation of an appeal by the Government vakeel under instruction from the Collector on behalf of a minor under the Court of Wards is not a valid presentation if not accompanied by a Vakalatnama duly executed by the manager under the Court of Wards. The subsequent filing of the vakalatnama cannot be treated as referring back to the date of the invalid presentation. (Sribhandan *v.* Haroo Sethy, decided by Pigot and Stevens, JJ., on the 9th of August 1895, and reported in the *Statesman* of the 10th of August 1895.)

P. 571. As to presenting an appeal without filing the required copies of decrees, see also Chamba *v.* Amer, I. L. R., 16 All., 77.

Amendment. As to insufficiency of Court fees, see also Barkatunissa *v.* Muhammad, I. L. R., 17 All., 289 at p. 290. In this case it was also held that a Court is not precluded from returning a plaint for amendment of the description as to the area of the property in suit, simply because at the time it is returned for amendment, the period of limitation for the suit may have expired.

P. 572. (Application in *forma pauperis*.) When an application for leave to sue as a pauper is *rejected* and the applicant subsequently pays in the requisite court-fee for a non-pauper's suit, such suit dates for purposes of limitation from the time when the court-fee is so paid in. It may be otherwise when, leave having been *granted*, the applicant is subsequently dispaupered. (Naraini *v.* Makhan, I. L. R., 17 All., 526.)

Pp. 573 and 574. (Act I of 1887. Sec. 7 of the General Clauses Act I of 1887 is not retrospective. (Raj Chunder *v.* Gour Chunder, I. L. R., 22 Cal. 176 at p. 178.) There is no "broad principle" of extending the time prescribed.

P. 575. Sec 5. (Sufficient cause.) *Bonâ-fide* mistake as to the jurisdiction of the Court is a sufficient cause within the meaning of sec. 5. (Seth Werbudaha *v.* Natheram, 8 Cent. Prov. L. R. 121.) Where the interests of the minor and his guardian in the suit were conflicting, he was, on attaining majority, allowed for "sufficient cause" to prefer an appeal 7 years after the date of the decree. (Cursandas *v.* Ladka, I. L. R., 20 Bom. 104.)

P. 579. (Sec. 6.) As to the interpretation of sec. 6, see Veerakuma *v.* Abbia, I. L. R., 18 Mad., 99 F. B. and addenda to page 219.

P. 582. Sec. 7 & art. 577. It has been recently held in Madras that sec. 7 does *not* apply to applications for the admission of an appeal to the Privy Council under art. 177. (Thurai *v.* Jainila, I. L. R., 18 Mad. 484.)

P. 588. (Sec. 8.) As to the application of the second part of sec. 8, compare Moidin *v.* Beevi, I. L. R., 18 Mad., 38.

P. 590. (Sec 10.) Directors of Companies. A director of a company, though he may occupy a fiduciary position with regard to the shareholders *collectively*, holds no such position with regard to *individual* shareholders. (Gilbert's case, L. R., 5 Ch. D. 559; Gower's case, L. R., 6 Eq. 77; Wilson *v.* Macanliffe, Allahabad Weekly Notes; I. L. R., 18 All. 56.)

P. 594. sec. 10. The joint possession of several trustees on behalf of the beneficiary *excludes* the possession of any one of such joint trustees on his *own* behalf. (Churcher *v.* Martin, L. R., 42 Ch. 312 at p. 319.)

P. 595. sec. 10. A suit brought by the heir of the creator of the trust, on failure of the object of the trust, to recover the trust property for her *own* benefit (and not for the trusts), is not governed by this sec. (Jasoda *v.* Parmanando, I. L. R., 16 All. 256.)

A trustee's possession of lands, and application of the rents to the purposes of the trust, under a deed of trust which is absolutely void under the law, is adverse to the grantor and his heirs or representatives. Even if one of these heirs happen to be one of several trustees, that fact would not prevent the operation of the Statute against such heir. (Churcher *v.* Martin, L. R., 42 Ch. 312.) Possession under a void trust deed.

A suit for an account against the trustee may be barred by limitation, at least in cases where there is no proof of a fund in the hands of the trustee and his waste or misapplication of it. (Advocate-General *v.* Punjaba, I. L. R., 18 Bom. 551 at p. 566.) P. Accounts.

Where the judgment was delivered on the 16th June, the decree signed by the Judge on the 24th June, and the 25th, 26th and 27th June were holidays, the appellant, who applied for a copy of the decree on the 28th June, was held to be entitled to exclude the three holidays in computing the period of limitation, as it was impossible to get a copy of the decree or to do anything to procure one on those three days. (Srichundun *v.* Haroo Sithi, Civil Appeal decided by Pigot and Steven, JJ., on the 9th of Aug. 1895. See the *Statesman*, 10th Aug. 1895.) Pp. 600, 601, secs. 5 and 12. Holidays *preceding* application.

In Ramanuja *v.* Narayana, I. L. R., 18 Mad., 374, Best and Ayyar, JJ., observed that they were not prepared to accept the opinion, that the date on which the decree was actually signed was in itself material. The practice of the Madras High Court in this respect differs from that of the Calcutta High Court. Date of signing a decree.

It is *not necessary* that an application for a review of judgment or an application to set aside an award should be accompanied by a copy of the decree, order, judgment or award. But if a copy is applied for and filed with such an application, the time requisite for obtaining the copy shall be excluded. (Wajid Ali *v.* Nawab, I. L. R., 17 All. 213 F. B.) Pp. 601, 602. (Sec. 12.) Copy of decree when not required.

It has been held that where a Munsiff returned a plaint because the suit as framed was beyond his jurisdiction, and the plaintiff having abandoned a part of his claim sued again in the same Court, he was not entitled to the benefit of sec. 14. (Nayinakamen *v.* Madureswarsa, 5 Mad. L. J. 58.) P. 607. Sec. 14, cl. 1. Reinstitution of suit after return of plaint.

It has been held by Collins, C. J., and Shephard, J., that mis-joinder of causes of action and parties is not a "cause of a like nature" with want of *jurisdiction*. The Calcutta ruling in Deo Pershad's case has been dissented from. (Tirtha *v.* Seshagiri, I. L. R., 18 Mad, 299.) Pp. 608, 609, sec. 14. Mis-joinder.

As to sec. 15 not being applicable to applications for execution, see also Lakmi *v.* Ballam, I. L. R., 17 All. 425, but compare Nawalchand *v.* Amichand, I.L.R. 18 Bom. 734. As to the effect of an attachment of a debt, see. also Beti *v* Collector, I.L.R., 17 All 198 P. C. P. 611. Sec. 15.

The holder of a certificate of administration under Bombay Regulation VIII of 1827 is not a representative of the estate for the purpose of distributing it among the co-sharers. (Keshav *v.* Narayan, I. L. R., 14 Bom 240. P. 612. Sec. 17 and Art. 123.

A "will is not proved" in the technical sense unless it has been proved in due form, and unless probate has been granted by the proper Court. An application and an *order* for probate do not "prove the will." An executor, even after taking the oath of office, may renounce before probate is actually granted. The executor does not become responsible for his acts and defaults to the beneficiaries under the will, unless he has either intermeddled with the assets, or duly clothed himself with a representative character. A sale in execution of a judgment obtained against an executor who has neither intermeddled with the testator's assets nor actually obtained a grant of probate, does not bind the deceased's estate. Probate or letters of administration, even if irregularly granted, are valid till revoked. (Mohamidu *v.* Pitchey, 1894, A. C. 437.) P. 613, when an executor becomes the representative of the testator's estate.

Sec. 17.

As nothing in sec. 17 applies to suits for the possession of immoveable property or of an hereditary office, it has been held that the operation of the law of limitation will not be affected by the fact that there is no lawful sebait or manager of the *math* or temple to which the property belongs (Vithalbowa *v.* Narayan, I. L. R., 18 Bom. 507.)

It has been held in Bombay that the words "representative *capable* of instituting a suit" in sec. 17 means a representative who is not a minor or a lunatic. (Rivett Carnac *v.* Goculdas, I. L. R., 20 Bom. 15 at pp. 43, 44.)

P. 615. Means of knowledge of fraud. Sec. 18.

In a suit for ejectment, knowledge may be presumed from the existence of the means of knowledge, but in a suit for accounts *between partners* means of knowledge of fraud committed by one partner against another may *not* amount to knowledge unless it is proved that plaintiff had reason to suspect the good faith of his copartner and that he nevertheless neglected to avail himself of that means. (Betjiman *v.* Betjimen, 1895, 2 Ch. 474 at p. 485.)

P. 617. Sec. 18. Fraud of agents.

Where fraud on the part of a person acting as the defendant's agent and a concealment of the fraud by such agent are alleged, it must, in order that sec. 18 may apply, be shewn that such agent committed the fraud while acting within the scope of his authority and purporting to do it for his principal (the defendant). If a person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, his fraud cannot be treated as the fraud of his principal. (Thorne *v.* Heard, 1895, A. C. 495 at p. 502.)

P. 618. Sec. 18 Agent's knowledge.

Where the first mortgagee sells the mortgaged property by an agent A, who is also the mortgagor's solicitor, *quære* whether the knowledge acquired by A as the mortgagor's solicitor was constructive notice to the first mortgagee of the existence of a second mortgage, so as to make them trustees for the second mortgagee in respect of the residue of the sale-proceeds. (Thorne *v.* Heard, 1895, A. C. 495.)

Allegation and proof of fraud.

General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. (See 5 App. Cas. 697, and Chanuirapa *v.* Danava, I. L. R., 19 Bom. 593 at p. 601.)

P. 621. Sec. 19. Terms of an acknowledgment.

Where one attorney writes to the attorney of the opposite side, in a suit which is coming for trial, asking him to consent to a postponement "in order that the parties might settle the suit, and if they would not settle, the case would go on," the writing is not an acknowledgment of liability in any sense of the term. (Administrator-General *v.* Chandrakant, I. L. R, 22 Cal. 952 at p. 954.)

The fact that a mortgagor speaks of the mortgage deed he is executing as a "third mortgage," is clear indication that the first and second mortgages exist, and the words amount to an acknowledgment of liability under these mortgages. (Per Collins, C. J., and Parker, J., 5 Mad. L. J. 241 at p. 243.)

P. 624. Sec. 20. Unregistered mortgage.

Even if the mortgage bond assigns the rents of the mortgaged land in lieu of interest, the bond, if unregistered, cannot prove the assignment or be evidence of payment of interest *as such*. (Venkaji *v.* Shidramapa, I. L. R., 19 Bom. 663.)

P. 625. Sec. 21 "Only."

The words "by reason only" in sec. 21 show that the section was not intended to have any application where the acknowledgment or payment, though made by one co-debtor, was made by him, for and on behalf of another co-debtor at his request. See the remarks of the Court of Appeal on the corresponding section in the Mercantile Law Amendment Act in Tucker *v.* Tucker, 1894, 3 Ch. 429 at pp. 435—438.

As to the power of the *Court* to add a party at any time, see also Bindeshri *v.* Ganga, I. L. R., 14 All., 154 F. B. P. 627. Sec. 22.

It has been held by Collins, C. J., and Davies, J., that even when a person is taken from the ranks of the defendants and made a plaintiff, he is added as plaintiff only on the date on which the change takes place, and sec. 22 clearly applies to him. (Srirangachariar *v.* Ramasami, I. L. R., 18 Mad. 189 at p. 192.) Pp. 628, 629. Sec. 22. Transposition of parties,

Where the plaint as originally framed contained the names of A, insane, by his guardian B as first plaintiff, and B as plaintiff No. 2, and where the pleader and B acting beyond their authority struck out A's name from the heading of the suit, before filing the plaint, and where A's name was subsequently restored on A's application in person, it was held that the restoration related back to the filing of the plaint, and that the suit was not barred if it was not barred at the date of its institution. (Kriparam *v.* Modia, I. L. R. 19 Bom. 135). Sec. 22. Restoration of a plaintiff's name after it had been unauthorisedly struck off.

Specific injury or special damage is caused to the plaintiffs by the obstruction of a public way leading from the village where they reside to that in which they have their fields and pastures. Such injury is peculiar to them and their calling ; it causes substantial loss of time and inconvenience ; and it is of a kind different from that which the public generally may suffer by reason of the obstruction. (Abzul *v.* Nasir, I. L. R., 22 Cal. 551.) See also Kazisuja *v.* Madhardae, I. L. R., 18 Bom. 693. P. 635. Sec. 24. "Special damage or injury."

As to the right to light in respect of an unfinished house, see Addenda to p. 429 *supra.* P. 644. Sec. 26.

The right to access of air to *definite* apertures or windows being access in a definite direction and in a particular channel may be acquired by immemorial prescription or the presumption of a lost grant or agreement, but not under the English Prescription Act. (Chastley *v.* Ackland, 1895, 2 Ch. 309.) A right to have the air at large float over the *whole* of the yard at the back of the plaintiffs' house cannot be acquired by prescription. If a new building on defendants' land interferes with ventilation and causes a stagnation of air in the plaintiffs' backyard so that noxious smells or vapors arising from plaintiffs' *own* urinals or other conveniences do not pass away as speedily as before, the plaintiff cannot complain of a nuisance against the defendant. (*Ibid*). *Wholly* stopping the air from coming to the plaintiffs' house by a definite aperture is a nuisance. (*Ibid* p. 400.) But causing a mere *diminution* of air is actionable in England only in cases involving a danger to health (*Ibid* p. 400.) The Indian law expressly recognises the acquisition by prescription of a right to the access of air to a building. The Indian Easements Act allows a suit for the obstruction of the passage of air where it interferes materially with the plaintiff's *physical comfort,* although it is not injurious to his health. And the extent of a prescriptive right to the passage of air to a definite aperture is that quantity of air which has been accustomed to enter that aperture during the whole of the prescriptive period (see Sec. 28 Act V. of 1882, and Sec. 33 expl. III. See also pp. 386, 450, 455 *supra.*) Sec. 26. Right to air.

As to whether it is possible to acquire a prescriptive easement in respect of overhanging trees. See Addenda to p. 355 *supra.* P. 645. Sec. 26.

Where the plaintiff claimed against the defendant a right to *khas* or immediate possession of a plot of land and his suit for such possession was barred by limitation, sec. 28 would extinguish the plaintiff's right as claimed by him, but could not prevent him from recovering the last 3 years' arrears of rent from the defendant. (Vithalbowa *v.* Narayan, I. L. R., 18 Bom. 507.) P. 647. Sec. 28.

P. 651. Art 3. "Possession." The occupation of a trespasser not acquiesced in by the party in possession is not juridical possession (Amiruddeen *v.* Mahamud, I. L. R., 15 Bom. 685.) The possession of a servant or a relative as *representing* his master or relative is not juridical possession. (Nrittolal *v.* Rajendro, I. L. R., 22 Cal. 527.) Such a trespasser or representative cannot sue under section 9 of the Specific Relief Act. (*Ibid.*)

P. 655. Art. 10. Physical possession. The right to collect a share of the rent or produce of undivided property is not *tangible* property within the meaning of the Criminal Procedure Code (Surb Narain *v.* Birjmohan, I. L. R., 23 Cal. 80.)

P. 656. Art. 10. Unregistered sale. The Right of pre-emption attaches to a Muhammadan's unregistered transfer (with possession) of immoveable property even when exceeding in value rupees one hundred. (Begam *v.* Muhammad, 1. L. R., 16 All. 344 F. B.)

P. 658. Art. 11. Order rejecting a claim. If the order merely says "there is nothing to show that the claimant's lands have been attached," the order is not one within the meaning of sec. 283 of the Code. (Puthamma *v.* Prodosham, I. L. R., 18 Mad. 316 at p. 319.) If the claimant states that he is not in possession and his application is practically withdrawn, the order of the Court dismissing his application is not an order to which art. 11 applies. (Munisami *v.* Arunachal, I. L. R, 18 Mad. 265.)

P. 659. Art. 11. Art. 11 does not apply where no claim has been preferred to property attached by the decreeholder. (Krishnahhupati *v.* Vikrama, I. L. R, 18 Mad., 13 at p. 17).

Pp. 659, 661. Where after the rejection of a claim to the property attached in execution, the decree-holder withdraws the attachment, the order rejecting the claim cannot operate to the prejudice of the claimant. The attachment in this case was withdrawn before the expiry of one year from the date of the order of rejection. It is not necessary to set aside the order of rejection in such a case, and the order is not conclusive of the question of the claimant's title. (Gopal *v.* Bai Divale, I. L. R., 18 Bom. 241).

P. 669. Art. 13. A suit to set aside an order of the District Judge, appointing a person as a member of a temple committee under Act XX of 1863, is governed by art. 13 and not by art. 120. (Subramaniya *v.* Minaksh, 3 L. J. 128.)

P. 677. Art. 30. A suit for compensation for losing goods against a railway company falls within Art. 30. (G. I. P. Ry. Co. *v.* Raisett, I. L. R., 19 Bom. 165 at pp. 185-188.) But the current of decisions in the other High Courts is opposed to this ruling. (*Ibid* p. 188.)

P. 679. Art. 36. Where (in the course of the winding up of any Company under the Companies Act 1882) an application is made by any liquidator, creditor or contributory of the Company to compel a manager, auditor or other officer of the company to make compensation in respect of any misfeasance or neglect of duty, such *application* is not a suit for compensation for misfeasance within the meaning of art. 36. There is practically no limitation applicable to such a *proceeding*. (Conner *v.* The Himalayan Bank, I. L. R., 19 All. 12.)

P. 680. Arts. 36 and 39. Standing crops. Art. 39 cannot apply to a suit for the value of standing crops forcibly carried away by the defendant, if the plaint does not *allege* any damage in trespass. (See Suratlall *v.* Umer Hazi, I. L. R., 22 Cal. 877.)

P. 682 Art. 40. Copyright. Translating the plaintiff's book is not infringing the plaintiff's copyright under the Indian Act. (Macmillan *v.* Shamsul, I. L. R., 19 Bom. 557.)

Art. 44 does not apply to a suit to set aside a sale in execution of a decree obtained against a minor represented by his guardian. It is not a "sale by a guardian." (Subramania *v.* Siva, 4 Mad., L. J. 152.) P. 684. Art. 44.

The words "wrongfully taking or detaining the same" in art. 48 apparently refer to wrongfully taking or detaining specific moveable property which has been already lost or stolen, or dishonestly misappropriated or converted. The same words in art. 49 apparently refer to *other* specific moveable property, that is, to specific moveable property *not* (then) lost, stolen, misappropriated or converted. But it has been held by Mr. Justice Norris that the words "wrongfully taking" in art. 48 embrace "a taking by theft, dishonest misappropriation or conversion." (See Surat *v.* Umar, I. L. R., 22 Cal. 877, at p. 883.) According to Mr. Justice Ghose, however, a suit for compensation for the wrongful taking of specific moveable property by theft or dishonest misappropriation or conversion comes under art. 49. (*Ibid* p. 885.) Both the learned judges agree in holding that standing crops cut and carried away by the defendant are specific *moveable* property, within the meaning of arts. 48 and 49. Mr. Justice Rampini is of a different opinion. (*Ibid.*) P. 689. Arts. 48 and 49.

It has been held by Candy, J., that art. 60 cannot apply to suits to recover money deposited in trust for any specific purpose, for to them section 10 would apply. The *ordinary* banking dealings between a native banker and his customers are regarded by the law as loan transactions, and as such must be governed by art. 59. A distinction, however, may be drawn between money deposited in a bank to provide for a current account, and money paid in on a deposit account. The latter class of cases, and other cases where the depositee (whether a banker or not) stands in a fiduciary position to the depositor, that is, all cases in which there is an implied or constructive trust (not falling within section 10) are governed by art. 60. (Dorabjee *v.* Muncherji, I. L. R., 19 Bom. 352, at pp. 359 and 360). On appeal it was held that the circumstances of the case may show that a transaction is of a fiduciary character and not an ordinary loan. (Munchurji *v.* Dorabjee, I. L. R., 19 Bom. 775). Whether a particular transaction is a loan or a deposit is a question of fact to be decided upon the evidence in each case. There is nothing in the relation between a banker and his customer to preclude full effect being given to the intention of the parties as gathered from the circumstances of the case. (Perundevi *v.* Nammalvar, I. L. R., 18 Mad. 390.) P. 695. Art. 60 Loans and Deposits.

As to interest proper which becomes a *part of the debt*, and interest as *damages* for non-payment on a certain date, see Addenda to p. 337 *supra*. P. 702. Art. 62 Interest.

If there is an agreement to pay interest, independently of the principal amount lent, at the end of each year from the date of the loan, a suit for the money lent may be barred under art. 57 or art. 59, but a suit for the interest may not be barred under art. 63. (See Starling, 3rd Ed. p. 186.) P. 705. Art 64

See Ratta Ram *v.* Musst Nana, F. B. Punj. Rec. No. 3 of 1878. Rivaz, 4th Ed., p. 130. P. 713, Art 75.

A deceased creditor's promise made in his will, without consideration, to extend the time of payment of an instalment, cannot be relied upon as *evidence of waiver*. A will being necessarily a *revocable* instrument, the option is not exercised so as to determine the creditor's *locus penitentiæ*. (Venkatacharlu *v.* Venkataramany, 5 Mad. L. J. 241 at p. 243.) Waiver by Will.

P. 713. Mumford *v.* Peal, I. L. R., 2 All. 857, followed as to evidence of *waiver*. (Kanku *v.* Rustomji, I. L. R., 29 Bom. 109.)

P. 715. Art. 75 Proviso accelerating cause of action for whole. Where the terms of the bond give the plaintiff an option to sue for the *whole* amount on default of payment of any instalment, and in the exercise o his option he sues only for the instalment due, he does *not split* his cause of action, and sec. 43 of the Code is no bar to a subsequent suit for a subsequent instalment. (Badi Bibi *v.* Sami, I. L. R., 18 Mad. 257.)

As to the right to redeem or foreclose. Beng. Reg. 17 of 1806, and Act IV. of 1882. The mortgagee's right to foreclose under Reg. 17 of 1806 of the Bengal Code does not accrue until the expiration of the entire "period stipulated" in the clause providing for redemption, and cannot be accelerated by virtue of any proviso in the deed, which upon default of payment of interest accelerates (without express reference to the clause for redemption and avoidance of forfeiture) the time at which the principal is to fall due. (Kishori *v* Gunga, L. R. 22 I. A. App. 183.) This ruling is apparently not applicable to mortgages under the Transfer of Property Act. Under secs. 60 and 67 of the Act (IV of 1882) the mortgagor's right to redeem and the mortgagee's right to foreclose accrue at *any time after the principal money has become payable*, whether under the clause for redemption or under any proviso which accelerates the time at which the principal money is to fall due.

P. 720 Pledge of moveables. Art. 120 applies to suits to enforce liens on moveables. See also Madan *v.* Kanhai, I. L. R., 17 All. 284.

P. 722. Art. 84. "Suit or business." "Business" may be litigious or non-litigious. All litigious business is not necessarily covered by the term "suit." A proceeding under sec. 24 of Act XV of 1877 for the revocation of a patent, it has been held, is not a "suit." But the analogy of an ordinary suit ought to apply to such a proceeding. Following the decision of the Bombay High Court and English cases on the subject, it has been held that a suit terminates on the date when the Court gives its judgment. Opposing the taxation of the opponent's costs (although done under the client's instruction) *subsequently* to the date of the judgment, will not take the matter out of the Limitation Act. (Watkins *v.* Fox, I. L. R., 22 Cal. 943.)

P. 728. Art. 91 does not apply to a suit to set aside a will. In a suit by a disinherited heir substantially to set aside his father's will on the ground that it was void or invalid, instituted more than three years after the testator's death, and the time when the plaintiff became aware of the provisions of the will, it has been held by their Lordships of the Privy Council, that "art. 91 has no application to the case of a will." (Sayid Ali *v.* Ihad Ali, I. L. R., 23 Cal. 1 P. C.) This case practically overrules the decision of Prinsep and Amir Ali, J.J., in I. L. R., 19 Cal. 629, referred to at p. 736 *infra*.

Arts. 91 and 95. Pp. 736, 740. In Chanvirappa *v.* Danava, I. L. R., 19 Bom. 593 at p. 599, Bayley, Offg. C. J., relied on the analogy afforded by suits to set aside an adoption, and held that art. 91 (as modified by sec. 7) applied to a suit which was substantially a suit to set aside a deed of partition (executed by the plaintiff's guardian) on the ground that it was unfair and fraudulent as against the plaintiff. Art. 95 (as modified by sec. 7) might also apply to such a case.

P. 741. Art. 97. Under art. 97 time runs from the date when a sale by A's wife is avoided by a final decree obtained by a judgment-creditor of A. Art. 62 applies to cases where the sale is void *ab initio*. (Venkata *v.* Peramma, I. L. R., 18 Mad. 173.

Mr. Justice Candy doubts if the representative of a deceased partner may maintain a suit for the whole or a share of particular assets recovered by the surviving partners after such representative's right to sue for a general account of the partnership dealings has been time-barred. (Rivett Carnac *v.* Gooculdas, I. L. R., 20 Bom. 15 at p. 34.) Farran, C. J., and Starling, J., observe that there is some difference between Indian and English law on the subject. (*Ibid.* p. 43.) But they do not give any decided opinion as to the correctness of the decision in Merwanji *v.* Rustomji, I. L. R., 6 Bom. 628, which, though doubted by Candy, J., was followed by him. (*Ibid*, p. 40.) It has been held in this case (20 Bom. 15) that sec. 17 of Act XV of 1877 applies to a suit by the representative of a deceased partner for a general account of the partnership dealings against the surviving partners. But it is apprehended that as the deceased partner could have sued for an account before his death, the *right* to sue existed and accrued during his lifetime, and sec. 17 can hardly be applicable to such a suit. The time from which the period of limitation is to be *computed* under art. 106 is the date of the dissolution of the partnership, but every partner has a *right to sue* for a general account even before the partnership is dissolved by death or otherwise.

Pp. 746, 748. Art. 106. Assets recovered after death of one partner. Sec. 17.

It was held by the Calcutta Sudder Court that in a claim for the balance of (current) rent unsatisfied by the sale of the (*patni*) tenure itself, the cause of action arose on the date on which the tenure was sold and proved to be insufficient to meet the demand upon it, and on which the *balance* became a *personal* debt of the individual tenure-holder. (See Maharajah Mahatab Chunder *v.* Munookoomaree, S. D. Rep. for 1858. p. 1688.) This case, even if it lays down the law of the Regulations correctly, cannot apply to suits for balances of rent under the Bengal Tenancy Act or under Art. 110. The cause of action for the balance of rent must be held to accrue when the rent fell due. Reg. App. No. 288 of 1894 decided by Petheram, C. J., and Beverley, J., on the 27th of August 1895. See Burna Moyi *v.* Burma Moyi, I. L. R., 23 Calc. 191.

P. 750 Art. 110 Cause of action for balance of rent.

The principle of the Privy Council decision in Rani Surnamoyi's case (11 W. R. P C. 5) does not apply where a tenant is illegally ejected and he recovers possession after a lengthened litigation. In endeavouring to avoid the law of limitation (for suits for arrears of rent) the landlord would in such a case be seeking to take advantage of his own wrong. (Mahomed *v.* Mahomed, I. L. R., 23 Cal. 205.)

P. 751. Art. 110.

As there was nothing to prevent the plaintiff from *instituting* the suit for rent, Sobhandri's case, I. L. R., 17 Mad., 225, has been overruled. (See Sriramula *v.* Sobhandri, I. L. R., 19 Mad., 21.)

P. 751 Rent suit. A case overruled.

On the 14th March 1888, *A* gave his son *B* a note or rather a bill addressed to *A's* firm in these words: Please pay Rs. 7,000 in respect of the ornaments appertaining to *B's* marriage, together with interest thereon at the rate of Rs. 4 per cent. per annum, within a period of three years from this the day of *B's* marriage." On the same date *B* took this note to *A's* firm and, in return, received the following receipt addressed to himself:—"You sent one chithi (note) for Rs. 7 000 on me. The sum which your father *A* caused to be paid to you in respect of the ornaments appertaining to your marriage has been credited to your account bearing interest at 4 per cent." No money was actually paid by *A* to *B*, and none was lodged with *A's* firm by *B*, but subsequently to the above transaction an account was kept in the books of *A's* firm in which *B* was duly credited with interest every year. *B* demanded these moneys from *A* by letter on the 9th and 22nd March 1894, and *B* and his wife filed their suit on the 12th of April 1894—more than six years after the day of their marriage. *Held* that the receipt read with the order or note was a receipt by the

P. 756 Arts. 67, 115. Contract whenbroken

defendant's firm for Rs. 7,000 payable with interest at 4 per cent. but not to be demanded as of right within three years. *Held* also that the purpose for which the money was to be paid, *viz.*, the purchase of ornaments for the wife, indicated that it was the intention of the parties that payment should not be made until the plaintiffs were prepared to purchase ornaments, and that until then the money should remain with the defendant's firm. The intention was that the money should not be paid until the plaintiffs required it for the purpose for which it was destined, and demanded it. The contract was not broken until the plaintiffs demanded the money. Art. 115 applied to the case, and the suit was not barred. (Mancherji *v.* Nusserwanji, I. L. R., 20 Bom., 8 at pp. 12 and 13.)

P. 757 Art. 116. Contract in writing.

Best and Ayyar, JJ., have, on the 8th of March 1895 (differing from a previous decision of Kernan and Brandt, JJ.) held that a contract in writing, even if signed by only one of the parties to it, is a contract "in writing" within the meaning of art. 116. (Ambalavana *v.* Vaguran, 5 Mad. L. J. 228.)

P. 760, Art. 117.

As to foreign judgments, see also Sivarawan *v.* Sharam, I. L. R., 18 Mad., 327.

Pp. 761, 762. Art. 118. Adoption.

In a suit which relates entirely to the estate of a male Hindu, if the adoption (set up by the defendant) is found to have been really made by the widow of a son to herself, and not to her husband, the plea of limitation under art. 118 has no application. (Lachman *v.* Kanhya, I. L. R., 22 Cal., 609 at p. 614 P.C.

P. 762.

In the case of Ghandharap *v.* Lachman, I. L. R., 10 All., 485, it was found that a person calling himself the adopted son of the last male owner was in possession as such from the death of such owner to the exclusion of his widow. It was *assumed* in this case that adverse possession against the widow was adverse to the reversionary heir. So far Gandharap's case has been explained away. See Ramkali *v.* Kedar Nath, I. L. R., 14 All. 156 at p. 160.

P. 762, Arts. 118 and 141.

Notwithstanding the expression of opinion in I. L. R., 20 Calc. 487 P. C., the principle of the ruling in Basdeo *v.* Gopal, I. L. R., 8 All., 644, has been followed in Nathu *v.* Gulab, I. L. R., 17 All., 167.

P. 763.

As to the onus of proof of knowledge, see also Lachman *v.* Kanhaya, I. L. R., 22 Calc., 608 at p. 614 P. C.

P. 770, Art. 120.

A charge on chattels may be enforced within 6 years under art. 120. See also Madan *v.* Kaupai, I. L. R., 17 All., 284.

Pp. 781 and 822, Arts. 125, 141 and 144.

It may be observed that in Krishnaji's case, I. L. R., 13 Bom., 276, the cause of action had accrued under the old law more than 12 years before Act IX of 1871 came into operation. The possession of a person who dispossesses the adoptive mother cannot under the present law be adverse to the adopted son until the date of his adoption. Art. 144 applies to such a case. (Moro Narayan *v.* Balaji, I. L. R., 19 Bom., 869.)

P. 781, Art. 125.

An alienation by the mother and guardian of a minor is not an alienation by a widow within the meaning of this art. (Sundrammal *v.* Rangasami, I. L. R., 18 Mad., 193 at p. 200.)

P. 783, Art. 127, Mohamedans.

Art. 127 does not apply to a Mahomedan family unless such family is a joint family in the Hindu sense of the term. So held by Norris and Gordon, JJ., following the Allahabad and Madras rulings on the subject. (Mahomed *v.* Anarbi, I. L. R., 22 Calc., 954 at p. 959.)

P. 787. Art. 128. Maintenance.

If maintenance has *not* been *demanded* by a Hindu widow, and if there has been no *wrongful withholding* of the maintenance, *arrears* of maintenance cannot be decreed. (Seethamma *v.* Subbaragadu, I. L. R., 18 Mad., 403.)

For 11 Mad. 64, in para. 3, read 16 Mad., 64. P. 790.

Money paid by a co-sharer of the tenure, after the sale, to set aside the sale under sec. 174 of Act VIII of 1885 does not give him a *charge* on the share of his co-tenants. (Gopinath *v.* Ishur, I. L. R., 22 Calc., 800.) P. 800, Art. 132.

See *Addenda* to art. 63. P. 801, Interest.

As to the effect of symbolical delivery of possession, see also Harjivan *v.* Shivram, I. L. R., 19 Bom., 620 at p. 624. Pp. 813, 835, Arts. 138 and 142.

It has been recently held by Petheram, C.J., and Beverley, J., that art. 134 does *not* cover the case of a private purchaser from the purchaser of immoveable property at a sale in execution, and that such a case is governed by art. 136 which specifically provides for suits by a purchaser at a private sale. (Mohima *v.* Nobin, I. L. R., 23 Calc., 49.) But it may still be held that a suit by the son and heir of the execution purchaser for possession of the property purchased is governed by art. 138. Private purchase from an auction purchaser.

The possession of a person holding *under* a trespasser is adverse to the rightful owner from the time when such person entered the land. (See Sankeram *v.* Perisami, I. L. R., 13 Mad. 467.) P. 816, Art. 139 Adverse possession.

As to when a service tenure is determined, see Radhaprosad *v* Bandhu, I. L. R., 22 Calc. 98. Service tenure.

The case of an adopted son superseding the widow's estate on his adoption is a *casus omissus* in arts. 140 and 141, and must therefore fall under the provisions of art 144. As the adopted son does not claim through the widow, the possession of a person who dispossessed the widow does not become adverse to him until he becomes entitled to the property upon his adoption. (Moro Narayan *v.* Balaji, I. L. R., 19 Bom., 809 at pp. 814, 816.) Pp. 819, 826, Arts. 140, 141, 144. Adopted son.

The Calcutta Full Bench decision on art. 141 has been tacitly approved by the Privy Council. (Per Farran, J., in Moro Narayan *v.* Balaji, I. L. R., 19 Bom., 809 at p. 916.) P. 826 Art. 141.

As to the tacking of the possession of our predecessor to our own, see also Harjivan *v.* Shivram, I. L. R., 19 Bom., 620. Art. 144 Pp. 849, 852, 890.

Parker and Shephard, JJ., are of opinion that *until* an order absolute is passed under secs. 87 or 93 of the Transfer of Property Act, the relationship of mortgagor and mortgagee does not cease to exist, and that the mortgagor who fails to execute his decree for redemption within the time limited is entitled to bring a *fresh suit* for redemption. According to Shephard, J., even after an order absolute for sale has been made, the mortgagor may, under the provisions of the Code of Civil Procedure, *prevent* the sale by paying the money into Court. It has been held by a Full Bench of the Madras High Court that the mortgagor can not *execute* the decree for redemption, and pay off the mortgage debt himself, *after* the time limited by the decree for redemption. (Vallabha *v.* Vedapuratta, 5 Mad. L. J. 283.) If the mortgagee applies for an order absolute, the Court may then extend the time, and the mortgagor may then pay the money. (*Ibid.*) On this subject, see also Ranbir *v.* Drighel, I. L. R., 16 All. 23; Sheikh Wazir *v.* Dhuman, I. L. R., 16 All. 65; Taraprosad *v.* Bhobodeb, I. L. R., 22 Cal. 931; and Tilack *v.* Parsotum, I. L. R., 22 Cal. 924. In his last case it was observed that the equitable doctrine of laches might render it necessary for the mortgagee to make his application for an order absolute without unreasonable delay. Pp. 852, 876, 878, 890. Decrees *nisi* in mortgage suits. Execution. Fresh suit.

Pp. 858, 859. Appeals and applications in Baluchistan and Upper Burmah.

Appeals and applications, under the British Baluchistan Civil Justice Regulation III of 1890, are governed by the provisions of Act XV of 1877, as if such appeals and applications were made under the Code of Civil Procedure. (Section 95, Reg. III. of 1890.) Act XV of 1877 is also applicable to appeals and applications under the Upper Burmah Civil Justice Regulation. (Section 4, Reg. X of 1887.)

P. 864, Act V of 1894.

Act V of 1894 and sec. 310A of Code apply to execution sales held after the date when Act V of 1894 was passed and came into force. (Ranga Swami *v.* Vira Samy, I. L. R., 18 Mad. 477.) The decision of the Calcutta Full Court on the same subject has been reported. (See Jagodananda *v.* Amritalal, I. L. R., 22 Calc. 767.)

P. 875. Application for the admission of an appeal to the Privy Council.

Collins, C.J., and Parker, J., are of opinion that sec. 599 of Act XIV of 1882 superseded art. 177 of Act XV of 1877. Even where art. 177 is applicable, an applicant for the admission of an appeal is substantially an appellant, and is not according to these learned Judges entitled to the benefit of the provisions of sec. 7. (Thurai *v.* Jainabdin, I. L R, 18 Mad. 484.)

P. 876. Art. 178.

An *application* under sec. 214 of the Indian Companies Act, VI of 1882, to compel an officer of the Company to make compensation in respect of any misfeasance or neglect of duty on his part is not governed by art. 178. (Connel *v.* Himalayan Bank, I. L. R., 18 All. 12.)

Pp. 882, 890, 891. Cendency of application.

There is nothing in the law which requires that the execution of a decree, by sequestration of the profits of certain land, may not be pending or continue for any length of time till the debt is satisfied. (Keshavlal *v* Pitamber, I. L. R., 19 Bom. 361 at p. 366)

P. 883. Art 230.

It has been held by Aikman, J., without referring to the ruling in I. L. R., 6 Mad., 359, that an application for execution, even if made before the expiry of the 12 years prescribed by sec. 230 of the Code, can not be *granted* after the expiry of that period. (Ram *v.* Ram, I. L. R., 18 All. 49.)

P. 888. Art. 179. Pontinuance or revival.

An application for the *attachment* of the debtor's property cannot be treated as an application in continuance of a previous application for the *arrest* of his person. (Har *v.* Balgovind, I. L R, 18 All. 9.)

P. 891. Art. 179. Sec. 325A of the Code.

Where the debtor's property is attached and placed under the management of the Collector, sec. 325A of the Code may save the decreeholder's second application for execution even from the bar of the 12 years' limitation prescribed by sec. 230 of the Code. (Keshav *v.* Pitamberdas, I. L. R., 19 Bom. 261.)

P. 893, Art. 179.

An adjudication on the question of limitation in respect of an application for some prior instalments payable under a decree for future maintenance does not operate as *res judicata* when the question of limitation is again raised in respect of an application for later instalments payable under the same decree. (Kuppu *v.* Saminath, I. L. R., 18 Mad. 482.)

P. 895, Art. 179. Striking off. No appeal.

An order striking off an application for the sale of attached property may be nothing more than a temporary adjournment of an adjudication on the application and the objection thereto. Not being a *judicial* disposition of the application, an appeal from such an order is superfluous and must be dismissed. (Ratanji *v.* Hari, I. L. R., 17 All., 243.)

P. 896. Art. 179. Transmitted decrees.

Where the transmitting Court has made no order for *execution* and where the order is for *transmission* only, the question whether, the objection of limitation should or should not be decided by the Court to which the decree has been transferred for execution must depend upon whether it could satisfactorily decide the matter

upon the materials before it, or whether those materials would not be more readily available to the Court which passed the decree so as to require that the objection should be made before and decided by that Court. (Chotaylal *v.* Baran Mull, 23 Cal., 39. See also Jasseda *v.* L. M. Bank, I. L. R., 8 Cal., 916.)

The decisions of the Madras High Courts in Ramanandon *v.* Peritambi, I. L. R., 6 Mad. 240, and in Rama *v.* Varoda, I. L. R., 16 Mad. 142, seem to be opposed to the principle of the Calcutta Full Bench ruling in Asgar *v.* Troilokya, I. L. R., 17 Cal. 631. An application for execution not giving all the particulars required under sec. 235 of the Code is *not* an application in accordance with law, specially if such application is returned for amendment and no appeal is preferred against the order, and the application is not amended in due time. (Gopal *v* Janki, I. L. R., 23 Calc. 217.) Such an application does not give a new start even if the Court did not record on it an order of rejection under sec. 245 of the Code (ibid at pp. 222, 226.)

Pp. 909, 911. Art 179. Informal application.

An application by *some* of several defendants to execute a decree in respect of their *proportional share* of the costs jointly awarded to *all* the defendants is not maintainable and must be dismissed. (Muthusami *v.* Natesa, I. L R., 18 Mad., 464.) But if payment has been made out of Court to one of the joint decreeholders for the benefit of them all, the Court will recognise the payment and record satisfaction to the extent of that decreeholder's share, allowing the applicants to execute for the balance only. (*Ibid.* See also Tarruck *v.* Divendro, I. L. R., 9 Cal., 821, and Sultan *v.* Savalaya, I. L. R., 15 Mad., 343.)

P. 910. Art. 179. Partial execution.

Under the Dekhan Agriculturists Act, the Court cannot *entertain* an application unless the conciliator's certificate is produced. But under the Succession Certificate Act the Court may entertain an application and is only precluded from *proceeding* with it except on the production of a certificate under the Act. (Balkisan *v.* Wagarsing, I. L. R., 20 Bom., 76 at p. 78.)

P. 913. Art. 179. Production of certificate.

An application for the transfer of a decree to another Court can not be treated as an application for the *execution* of a decree. (Suja Hossein *v.* Monohor, I. L. R., 22 Cal., 921).

P. 915. Art. 179.

See also Keshavlal *v.* Pitamberdass, I. L. R., 19 Bom., 261 at p. 267.

Oral application.

As to applications by the representative of a decreeholder, see I. L. R., 19 Bom., 261 at p. 268.

P. 916. Art. 179.

According to Aikman, J., if there is reason for maintaining an attachment, there can be no reason for striking off the application in execution which led to its being made ; and an order striking off an execution case whilst maintaining an attachment which has been made in that case is a contradiction in terms.

Pp. 917, 919. Continuing an attachment.

It has been held in Bombay that in the case of mere money decrees, where the debtor's property is attached and sold, a mere receipt of money from the Court is not a step in aid of execution, but under certain circumstances such as where the debtor's property is under the terms of the decree attached, and the profits sequestrated for a long period, applications to receive the proceeds of such property are steps in aid of execution. (Keshavlal *v.* Pitamberdass, I. L. R., 19 Bom., 261 at p. 267.)

P. 920. Art. 179. Taking out money deposited in Court.

According to Petheram, C. J., and Beverley, J., when the sale of the property attached in execution, has been completed and the purchase-money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property, and

Art 179, cl. 4. Drawing money. Paying *nilamee* fee and poundage.

no application as regards the purchase-money, either to draw it out of Court, or to set it off against the decree when the decreeholder himself is the purchaser, can be properly said to be an application to the Court to take some step in aid of the execution of the decree. An applicati n by the decreeholder to pay "*nilamee* fee" or costs of bringing property to sale is an application to take a step in aid of execution, but an application by a decreeholder to pay poundage fee in respect of a purchase made by himself, being an application made after the sale, is not an application for such a step. (Ananda *v.* Hara Sundari, I. L. R., 23 Calc. 196 at p.199.)

P. 920 Art 179, Cl. 5. An application for the issue of a notice under sec. 248 upon the heir of the debtor is a step in aid of execution. (Keshavlal *v.* Pitamberdas, I. L. R., 19 Bom., 261.)

P. 921, Cl. 6. The Act allows an application for execution of a decree for maintenance passed in 1870 if the instalment of maintenance claimed accrued due on certain dates within three years of the date of application. (Kuppu *v.* Saminath, I. L. R., 18 Mad , 482.)

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